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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1188

JOHN J. KERRIGAN, ET AL.,
PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners are the School Committee for the City of Boston, Massachusetts, John J. Kerrigan, Paul Ellison, John J. McDonough, Kathleen Sullivan and Paul R. Tierney, as members of said School Committee, and William J. Leary, as he is Superintendent of the Boston school system. Respondents are Tallulah Morgan, and fifty-six other black parents and their children who attend the Boston public schools. Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on December 19, 1974.

Opinions Below

The opinion of the Court of Appeals for the First Circuit is not reported at this writing, but is submitted herewith in a separate Appendix, commencing at page 1.

The voluminous opinion of the District Court for the District of Massachusetts is reported at 379 F. Supp. 410 (D. Mass. 1974) and is submitted herewith in the separate Appendix, commencing at page 37.

Judgments Below

The Partial Judgment and Interlocutory Order of the United States District Court for the District of Massachusetts was entered on June 21, 1974, and is submitted herewith in the separate Appendix, commencing at page 174. The judgment of the Court of Appeals for the First Circuit was entered on December 19, 1974, and is submitted herewith in the separate Appendix, at page 35.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254 (1) and Rule 22(3). The judgment of the Court of Appeals was entered on December 19, 1974, and this petition for certiorari was filed within ninety (90) days of that date.

Questions Presented

1. Does the law still recognize a difference between de facto and de jure segregation, in terms of duty to eradicate?

2. Can a finding of de jure segregation be predicated upon evidence that opportunities to eradicate de facto segregation have been ignored?

3. Can a finding of de jure segregation be predicated upon evidence that good faith attempts to eradicate de facto segregation were not wholehearted, or were ineffectual, or have proved counter-productive?

4. Can a finding of de jure segregation be predicated upon evidence that the school committee continued to operate a de facto segregated school system?

5. Are blacks denied equal educational opportunity, in the absence of a statutorily created dual system, where students and teachers of both races are free to attend and teach at any school, and the races choose to segregate themselves?

6. What, if any, quantum of isolated, segregatory acts is necessary to support an order affecting an entire metropolitan school system?

Constitutional Provisions Involved

Fourteenth Amendment:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

A. *The Proceedings Below*

This petition seeks review of a judgment of the Court of Appeals for the First Circuit affirming a judgment of the District Court for the District of Massachusetts.

This is a school desegregation case brought by respondents, who were certified as representatives of a class of "all black children enrolled in the Boston Public School System and their parents" (A. 37)*, against petitioners, the School Committee of the City of Boston, its individual members, and the Superintendent of the Boston Public Schools.**

Respondents alleged that the petitioners intentionally brought about and maintained racial segregation in the Boston public schools by various actions, including the adoption and maintenance of pupil assignment policies, the establishment and manipulation of attendance areas and district lines reflecting segregated residential patterns, the establishment of grade structures and feeder patterns, the administration of school capacity, enlargement, and construction policies, transportation practices, and by unjustifiably failing to adopt or implement policies reasonably available to eliminate racial segregation in the Boston public schools, asserting that these alleged practices have resulted in denying black school children the equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution. (A. 38)

Respondents further contended that petitioners and their predecessors engaged in racial discrimination with respect to the hiring and assignment of faculty and staff, and with respect to curricula and the allocation of instructional materials, and resources; that petitioners implemented pupil classification practices which discriminate against some children in admission to certain schools, and main-

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* Fifty-seven in number; therefore not named individually.

** Also named as defendants, but not petitioners here, were the Board of Education of the Commonwealth of Massachusetts, its individual members, and the Commissioner of Education. The District Court found no liability against these "state defendants." The Mayor of the City of Boston was added as a party defendant after the District Court's decision, and is petitioning separately for certiorari.

tained a pattern of lower instructional expenditures in schools attended disproportionately by black children. Respondents argued that these practices deny black children their constitutional right to equality of educational opportunity under the Fourteenth Amendment. (A. 38).

Federal jurisdiction was invoked under 28 U.S.C. §1343, and violations of the Thirteenth and Fourteenth Amendments and 42 U.S.C. §§ 1981, 1983 and 2000d were alleged.

Petitioners generally denied respondents' allegations and argued that, to the extent that schools in the Boston School System may contain disproportionate numbers of blacks or whites, that result is due to factors over which they have had and have no control, and is due to the policy of providing neighborhood schools—a policy which long predated any segregation now complained of—which petitioners claimed was constitutionally permissible. Petitioners further suggested that they have tried to effect a better racial balance in the Boston public schools, both on their own initiative and in accordance with the Racial Imbalance Act, Mass. G.L. c. 71, §§ 37C and D. (A. 39).

The District Court found that substantial segregation exists in the Boston public schools (A. 56) and that petitioners "took many actions in their official capacities with the purpose and intent to segregate the Boston public schools and that such actions caused current conditions of segregation in the Boston public schools." (A. 167) It found the entire school system of Boston to be unconstitutionally segregated. (A. 170) The Partial Judgment ruled that "the rights of the plaintiff class of black students and parents under the Fourteenth Amendment to the Constitution of the United States have been and are being violated by the defendants by their management and operation of the public schools of the City of Boston," permanently enjoined petitioners from discriminating on

the basis of race in the operation of the public schools of the City of Boston and from creating, promoting, or maintaining racial segregation in any school or other facility in the Boston school system, and ordered petitioners "to begin forthwith the formulation and implementation of plans which shall eliminate every form of racial segregation in the public schools of Boston, including all consequences and vestiges of segregation previously practiced by the defendants." (A. 174-175) The Interlocutory Order preliminarily enjoined petitioners from:

> "(a) failing to comply in any respect with the Racial Imbalance Act plan ordered by the Supreme Judicial Court of Massachusetts to be implemented on or before the opening day of school in September, 1974;
> (b) beginning the construction of any new school or expansion or the placement of any new portables;
> (c) granting transfers of white teachers from schools with majority black enrollments or black teachers from schools with majority white enrollments;
> (d) granting transfers [of students] under exceptions to the controlled transfer policy." (A. 175)

Appeal to the Court of Appeals for the First Circuit, pursuant to 28 U.S.C. §§ 1291 and 1292, was taken from the District Court's judgment of liability against petitioners, the resulting permanent injunction and the interlocutory order. On December 19, 1974, the Court of Appeals for the First Circuit affirmed the judgment of the District Court. (A. 1, 34)

B. *Facts*

The members of the Boston School Committee, petitioners here, are unsalaried, elected at large and have general control of the operations of the city's schools, with the provisos that they do not have complete funding appropriations power, nor do they control site selection or construction of new schools. (A. 51). The Superintendent of Schools, also a petitioner, has charge of day-to-day operations.

Boston is comprised in substantial part of sections isolated geographically (e.g. East Boston, Charlestown), politically (e.g. Brighton) and otherwise (e.g. South Boston) from the city proper. (A. 52-53). Its elementary and intermediate schools are districted geographically. (A. 73). Petitioners have made no district changes which brought about segregation where there was none before. (A. 5). Half of the city's eighteen high schools, called "district" high schools, admit students only from designated, nearby, intermediate schools, with the proviso that under the open enrollment and controlled transfer policies, any student may attend any school that has a vacant seat. (A. 89). The other nine high schools, seven of which are specialized, admit students citywide. (A. 89). The three principal modes of grade progression are 8-4, 5-3-4, and 6-3-3. (A. 53). Students are moved from intermediate to high schools by "feeder patterns." (A. 14). The vast majority of petitioners' feeder pattern changes have been integratory.

Boston's schools are attended by approximately 96,000 students, of whom 61% are white, 32% are black, and 7% are other-minority. (A. 56). Eighty percent of the schools are sharply out of line with the 61:32 black-to-white overall ratio. (A. 56). Teachers are also segregated. (A. 58). Some schools are overcrowded and others are under-

utilized. Almost all overcrowded schools are disproportionately white while all underutilized schools are predominantly black. (A. 10, 59). Petitioners use portable schools to relieve overcrowding. (A. 63).

The Massachusetts Racial Imbalance Act, Mass. G.L. c. 71, §§ 37C and 37D, and c. 15, §§ 1I, J and K, in effect since 1965, commands affirmative action to eliminate racial imbalance in public schools regardless of its cause, i.e. independently of a finding of de jure segregation. (A. 41). In 1972, a state court, affirmed on appeal by the Supreme Judicial Court, found petitioners to be in literal compliance with the Act. (A. 44).

Reasons for Granting the Writ

The existence of de facto segregation in the schools of Boston was not and is not disputed. However, in addressing the question of whether that segregation was de jure, the Court of Appeals and the District Court applied a test in total conflict with that established by this Court in *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973). The lower courts' purported reliance on *Keyes* indicates that a clarification of the principles laid down in *Keyes* may be required.

The *Keyes* test for finding a dual system is not obscure. At 413 U.S. 201, this Court ruled:

> "[W]here plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system."

Again, *id.* at 203:

> "In the absence of such a determination [that the district is divisible], proof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of the existence of a dual system."

The mere reading of Appendix 7-9 will expose fully the extent to which the *Keyes* test was misapprehended below. The Court of Appeals expressly rejected petitioners' "basic contention" that:

> "[S]chool authorities in a northern city which has never had a statutory dual school system cannot be found to have violated the constitution unless they have taken affirmative acts which have brought about segregation in the schools." (A. 7).

"The controlling test" was said by the Court of Appeals to be:

> "[T]hat propounded in *Keyes,* where the relevant inquiry is described as an effort to determine whether the authorities' 'policies and practices . . . were . . . taken in effectuation of a policy to create or maintain segregation.' 413 U.S. at 213-14. *See also* 413 U.S. at 198 ('brought about or maintained by intentional state action'); at 211 ('create or contribute to the current segregated condition'); at 214 ('policy to create or maintain segregation'). That is, *Keyes* does not merely speak to those activities which cause or bring about segregation, but proscribes as well efforts to maintain segregation which may in the first instance be attributable to outside forces." (A. 8).

Close examination of *Keyes* reveals that the quotes from 413 U.S. 211, 213-214 describe the burden of proof on school authorities *after de jure segregation in a meaningful portion of the school system has been established.* The quote from 413 U.S. 198 is taken from a concession by the plaintiffs in *Keyes* and does not purport to announce the Court's view of the law. Finally, there is footnote reference to *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), as the antecedent for the quoted passages. *Swann* was, of course, concerned solely with remedies and assumed that a finding of de jure segregation had already been made.

In a nutshell, the Court of Appeals' version of the *Keyes* test for de jure segregation would be as follows:

> Although there is no duty to act affirmatively to eradicate segregation not found to be de jure, failure to act affirmatively to eradicate such segregation establishes that it is de jure.

This is, of course, a test that Mr. Justice Powell, dissenting in *Keyes*, would embrace. The Court of Appeals, for its part, openly embraces the Powell dissent at A. 8-10.

While the mere statement of the standard applied below should suffice to carry the day for petitioners, it may be incumbent upon them to demonstrate that the proof did not establish de jure segregation (if the correct standard be applied). The bulk of this petition, for which bulk we apologise, is therefore devoted to demonstrating the extent to which the finding of liability was predicated upon the use of the erroneous standard, and upon evidence that petitioners ignored opportunities to desegregate and that their voluntary attempts to desegregate were ineffectual, halfhearted, or proved in some cases to be counterproductive.

Because the proof can be viewed as establishing one or two unconnected, mariginally segregatory actions affecting a handful of students, an additional and important question, not reached in *Keyes,* is posed for decision by this Court: What quantum of affirmative, segregatory conduct is necessary to support an order for the all-out desegregation of a major city's schools? While *Keyes* speaks in terms of "substantial portion" and "meaningful portion" with respect to the affected schools, no standard exists for measuring conduct, as distinguished from effect.

The District Court spread its principal inquiry over six separate topics: (1) facilities utilization and new structures, (2) districting and redistricting, (3) feeder patterns, (4) open enrollment and controlled transfers, (5) faculty and staff, and (6) vocational and examination schools. (A. 5, 58). The same approach was taken by the Court of Appeals (A. 10) and, because a sifting process is required to demonstrate the extent of the lower courts' reliance on inaction, it is taken here.

I. Facilities Utilization and New Structures.

With respect to facilities utilization and new structures, the District Court claimed to have found "affirmative acts of [petitioners] related to overcrowding which . . . intentionally created or maintained segregation." (A. 62). The Court of Appeals characterized this as one of the "matters as to which affirmative actions were most prominent." (A. 10)

The first subtopic treated by the District Court was overcrowding. (A. 59) The Court first demonstrated that the vast majority of overcrowded schools in Boston are predominantly white, that underutilized schools are invariably predominantly black, (A. 10, 59) and that overcrowding is educationally harmful. (A. 60-61) Unable to

detect harm to the plaintiffs, the Court then found that petitioners "have responded on at least one occasion to the problem of overcrowding with actions contrary to sound educational practice" by assigning students at white, overcrowded Cleveland Jr. High to the already overcrowded,* white South Boston High, while there were closer, available seats at schools which were identifiably black. (A. 61) This refusal of petitioners to avail themselves of an opportunity to effect desegregation is the sole "affirmative" act attributed to petitioners under the heading of overcrowding. The remainder of the section deals with ignored opportunities to decrease overcrowding, busing as an available alternative to overcrowding, the reduction of overcrowding when it did not affect racial balance, and petitioners' foot-dragging in formulating plans to lessen overcrowding as well as racial imbalance generally. (A. 61-62)

Next examined was the related (A. 12n) topic of portable classrooms, where the District Judge demonstrated that portables were allocated almost exclusively to overcrowded white schools, (A. 63) which should not have been surprising in light of the prior finding that overcrowded schools are almost exclusively white. (A. 59) Who but an overcrowded school would need a portable? The answer, of course, is that portables *can* be used at full schools to effect desegregation in the same manner as the transfer of whites to underutilized black schools. Again, it was

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* The Court of Appeals appears to have tempered this finding by describing South Boston High as "ultimately" suffering from overcrowding. (A. 11).

Similarly, but with opposite effect, after the District Court found that "on several occasions" petitioners reduced overcrowding when it did not affect racial composition, (A. 61-62) the Court of Appeals expanded the finding to record the occurrence of transfers to alleviate overcrowding, but *only* where racial balance was not affected. (A. 11).

petitioners' *resistance* to using portables in this manner that aroused the Court's ire. (A. 12, 63-64) The maintenance or perpetuation of existing de facto segregation was thus converted in the Courts' mind to an intentional, segregatory act, contrary to *Keyes, supra.*

The District Court's analysis of the final subtopic, new facilities, proceeded oblivious to the preliminary finding that petitioners "lack[ed] autonomy in selecting sites and contracting for the construction of new schools, as to which final responsibility lies with the Public Facilities Commission, an independent agency of the city," (A. 51) and not a party defendant.* Against that background, the finding that most new schools or annexes opened racially imbalanced** (A. 64-65) is totally without force, particularly in light of the fact that the racial compositions of the neighborhoods around the new schools were in rapid flux. (A. 13)

The remainder of the subsection on new facilities noted petitioners' failure, with respect to some new annexes, to take advantage of additional state financial contribution for construction of schools which lessen racial imbalance. (A. 65) Finally, the Court detailed the openings of four particular schools to demonstrate that "in the matter of facilities utilization and new structures, the [petitioners] were covertly *resisting* the elimination of racial imbalance and endeavoring to *perpetuate* racially segregated schools.***

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* In any case "there is no constitutional duty . . . to select new school sites solely in furtherance of . . . a purpose [of alleviating racial imbalance that petitioners did not cause]." *Deal* v. *Cincinnati Bd. of Educ., supra*, 369 F.2d 55, 61 (6th Cir. 1966).

** The term is used in its technical sense, more than 50% nonwhite, which tends to shed light on the court's tacit rejection of respondents' claim that they were victims of lower expenditures. (A. 38)

*** Even this conclusion is surprising in view of the findings that the first school opened black in a white neighborhood (A. 12, 65-66); the second was a large school (the Court later complains of the segregatory effect of small, neighborhood schools) which opened

(A. 65) Emphasis is supplied to highlight the Court's inability to point out a single instance of affirmative segregatory conduct. The Court of Appeals concluded merely that the performance of new facilities as a means of advancing racial balance "was not spectacular." (A. 12)

It seems incredible that this section, which reveals no segregatory act, was viewed by the courts below as one of the "matters in which affirmative acts are most prominent." (A. 10)

II. Districting and Redistricting

The District Court examined petitioners' practices in the area of districting and redistricting elementary and intermediate schools from 1954 (A. 80) to 1972. (A. 76) From that examination emerges the conclusion, in the words of the Court of Appeals, "that, while [petitioners] made no changes to bring about segregation where there was none before, they made at least one change to perpetuate racial segregation." (A. 5) No suggestion was made that petitioners engaged in the type of district gerrymandering condemned in *Taylor* v. *Board of Educ. of New Rochelle*, 191 F. Supp. 181, 185 (S.D.N.Y. 1961), *aff'd*, 294 F.2d 36 (2nd Cir. 1961), *cert. den.*, 368 U.S. 940 (1961). Incredibly, the change referred to is the same, single act relied upon in the section on overcrowding (A. 61): the transfer of approximately 150 students from white, overcrowded Cleveland to white, ultimately-overcrowded (A. 11) South Boston High, when nearer seats were available in black schools. (A. 81) The District Court's double reliance on this single act is obscured to the casual reader by sixteen pages of inaction and resistance to change. (A. 72-87)

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majority black despite petitioner's massive efforts to recruit whites (A. 67); the third was permitted by petitioners to remain black under crisis conditions brought about by a black sit-in on opening day (A. 68-70); and the fourth, admittedly "did not materially affect racial segregation." (A. 70)

The District Court characterized its own findings thusly:

> "The bulk of the findings in this subdivision will describe extreme disparities in the racial composition of adjacent districts and the [petitioners'] uncompromising resistance to redistricting when it would have reduced racial segregation." (A. 74)

To the same effect, the Court of Appeals observed:

> "We now enter an area where decisions were mostly not to do something.
>
> . . . . . .
>
> "Generally, however, the court was concerned about the focused, knowledgeable resistance to otherwise feasible proposals and opportunities for redistricting." (A. 19)

The Courts were clearly relying on Mr. Justice Powell's blurring, if not abolition, of the distinction between de facto and de jure segregation. The Court of Appeals further stated:

> "[R]edistricting was undertaken where greater integration would not come about, thereby perpetuating existing disparities."* (A. 19)

It is thus clear that the Court of Appeals, like Mr. Justice Powell, would not only forbid the doing of that which is racially neutral, but would use it as evidence of segregatory intent to establish de jure segregation, thus imposing the duty to affirmatively desegregate. Unless the majority of this Court no longer embraces *Keyes, supra:*

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* The District Court used similar language:
"[Petitioners] defeated or evaded successive redistricting proposals for the purpose of perpetuating the existing segregated system." (A. 74)

> "We emphasize that the differentiating factor between *de jure segregation* and the so-called *de facto segregation* . . . is *purpose* or *intent* to segregate." 413 U.S. at 208 (emphasis in original)

and the holding in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) that the affirmative duty to desegregate arises only where the segregation is de jure, then the District Court and the Court of Appeals below have the cart before the horse. *See also, Bell* v. *School City of Gary, Indiana*, 324 F.2d 209, 213 (7th Cir. 1963), *cert. den.*, 377 U.S. 924 (1964).

Further diluting the impact of its own finding(s) on districting, the District Court admitted that "districting has much less to do with what school a pupil will attend in Boston than it may in other communities. This is because of practices which cut across district lines, such as the controlled transfer policy . . ." (A. 73)

The District Court did not, nor could it, lay on petitioners' doorstep the disparities in racial composition between adjacent districts. Neither was the Court able to assign racial motives to the existence of irregularly shaped districts, whose boundaries had little to do with natural or geographical barriers, the configuration of which was found to result in nearly the maximum possible amount of racial isolation. (A. 76)

The Court also found that multi-school elementary districts, only six of which contain distinct racial clusters, facilitate racial segregation. (A. 77, 79-80) Conspicuous, however, is the absence of any finding that petitioners created such districts with segregatory intent, perhaps because of the prior finding that students enrolling for the first time have a complete option as to which school in the district to attend. (A. 54)

The Court discounted, as not involving redistricting, petitioners' submission of plans

> "for the construction of new schools drawing pupils from more than one previously existing district; for the reassignment of pupils in connection with the conversion of certain grammar schools to middle schools for grades 6, 7 and 8; and for the closing of three racially imbalanced schools and the reassignment of their pupils." (A. 85)*

Finally, petitioners' proposal that a citizens' advisory committee be established, half of its members to be designated by petitioners and half to be designated by the State Board of Education, to review district lines, is dismissed by the Court as a charade because petitioners appointed to the committee persons known to be vehemently opposed to redistricting. (A. 85-86) Petitioners have made no secret of their opposition to redistricting; to suggest that it was "sabotage" (A. 86) not to appoint the joint committee citizens who did not reflect their own views is incomprehensible.

III. Feeder Patterns

By "feeder patterns" is meant the system of moving students from intermediate to high schools. (A. 14). They are Boston's high school equivalent of districting and redistricting (A. 19, 72) and, in the words of the Court of Appeals, another of the "matters as to which affirmative actions were most prominent." (A. 10)

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* The Court of Appeals similarly dismissed, as not involving redistricting in the strict sense, uncontroverted evidence that petitioners opened four schools for the purpose of improving racial balance. (A. 20n)

The Court of Appeals characterized the details as "incredibly complex." (A. 15) Some detail is unfortunately required here to demonstrate the fundamental flaws which belie the broad conclusion that "[petitioners] inaugurated changes in feeder patterns for the 1967-1968 and 1968-1969 school years, with knowledge of the probable consequences and 'for the purpose of promoting racial segregation' which routed black students into high schools beginning with a ninth grade, while white students, equipped with transfer options, were channeled into high schools beginning with tenth grade." (A. 5-6)

Some background findings bear mention. Boston is comprised in large part of distinct sections.* The "feeder" schools are ten elementary schools ending in grade eight (K-8), (A. 90) four middle schools (6-7-8) (A. 93-94) and fifteen junior highs (7-8-9) (A. 5) The "fed" schools are eleven high schools,** five of which contain grades 9-12 (A. 90) and six of which have grades 10-12. (A. 14, 90) Three of the five 9-12 high schools, Burke (for girls), Girls, and English (for boys) are now black and underutilized, (A. 59, 90) but during the 1967-1968 school years, which were the focus of the section on feeder patterns, English was 4:1 white and overcrowded. (A. 93) Three of

* "Boston, one of the oldest cities in the country, retains much of its colonial layout, particularly in the downtown area. Bays and rivers and the street layout of the city have to some degree isolated some sections. The Charlestown and East Boston areas, surrounded by the Atlantic Ocean and the Charles and Mystic rivers, are north of the center and have limited access to Boston proper. The South Boston area has less of a restriction on access, but remains a distinct section of the city. As in other places, political boundaries have also isolated one segment of the city. Thus, the Brighton-Allston area to the west, while easily accessible, is cut off politically from the rest of the city by the Town of Brookline except for a narrow connecting strip of Boston along the south bank of the Charles River." (A. 52-53)

** Boston has five additional high schools not considered in this portion of the opinions below because they are specialized, citywide schools not fed by feeder patterns. (A. 89) See part VI, *infra.*

the six 10-12 high schools, Roslindale, Hyde Park and Charlestown, (A. 90) were white and overcrowded (A. 59); Jamaica Plain (A. 95) and Brighton (A. 57) reflected, approximately, the 61:32 white to black ratio of the entire student population of the city (A. 56); and Dorchester was disproportionately black and overcrowded. (A. 59) Thus, three of the five 9-12 high schools were disproportionately white, and three of the six 10-12 high schools were disproportionately white.

Nine of the high schools are known as "district" high schools, and are fed only by designated intermediate schools, (A. 89) with the qualification that under the open enrollment and controlled transfer policies, discussed *infra,* part IV, which permit transfers to fill vacant seats, pupils from anywhere in the city may attend any high school. (A. 89) The other two high schools, English (for boys) and Girls (for girls), are city-wide, but are also fed in the sense that pupils from designated intermediate schools are accorded seat preferences. (A. 89-90)

It is important to distinguish here between a seat preference and a seat assignment. Although seat assignments make up part of the concept of "feeder patterns," the District Court's analysis concerned only seat preferences, which reserve a seat but do not require its use. Finally, there is no basis for the Court of Appeals' inference, *supra,* and at A. 15, that white students at any given school received greater or different preferences than blacks at the same school. Feeder patterns apply to schools, not races.

The District Court concluded that the "natural progression" of students from intermediate schools ending in grade eight to high schools beginning with grade nine, and from intermediate schools ending in grade nine (junior highs) to high schools beginning with grade ten, was one of several factors, together with overcrowding at some

schools and the reluctance of the races to mix, which enabled petitioners, by the use of seat preferences and options, to keep the races separate. (A. 90) The Court's own statistics and analysis do not support that conclusion; indeed, they require the opposite. For one thing, the above-described progression may be natural in the sense that it is the path of least resistance, but it is not required. Students at feeder schools ending in grade eight are not "locked into" 9-12 high schools. They are free to attend ninth grade at a junior high or transfer under open enrollment and controlled transfer, discussed *infra*, from a 9-12 high school to a 10-12 high school anytime after completion of the ninth grade. (A. 53, 90)

The analysis was generally confined to feeder pattern changes promulgated during the 1967-68 and 1968-69 school years (A. 96) by a specified assistant superintendent, with the conclusion that they had been "manipulated with segregatory effect." (A. 90) The Court first examined feeder patterns established in 1967 for the ten K-8 elementary schools, using tables (A. 91-92) to conclude that five of the six whitest K-8 schools fed 10-12 high schools (A. 92) (only one of which is majority black).

In fact, as the Court's own table shows, (A. 91) only *three* of the six whitest K-8 schools fed 10-12 high schools. Apparently forgotten was the Court's prior finding that East Boston and South Boston Highs are 9-12. (A. 90)

Because no conclusion as to segregatory acts or intent can be drawn at this stage of the analysis, it becomes relevant to see whether the individual seat preferences were geographically justifiable and, if not, whether they were segregatory. Chevrus and McKay, feeding East Boston High, (A. 91) are *in* East Boston, a small district which the Court had earlier found to be surrounded by water with limited access to the city proper. (A. 52-53) No high school is closer to Russell, feeding South Boston

High, (A. 91) than that school located in a district which the Court had found to have less of a restriction on access, but was, nevertheless, a distinct section of the city. (A. 53) The only intermediate or high school anywhere near white Parkman, feeding white Irving, (A. 91) other than Irving is equally white Roslindale. (A. 92) The students at almost-balanced Thompson were given complete freedom to choose between the two closest junior high schools: White Wilson and black Lewenberg, (A. 91) so nothing segregatory may be inferred, unless petitioners are to be held responsible for giving too much freedom of choice. Finally, the seat preferences accorded students from disproportionately black and other-minority Prince at the relatively distant Edison and Taft Junior Highs cannot be geographically justified, but they were integratory, because those schools were disproportionately white. (A. 91). It thus appears that the lower courts' finding of segregatory intent with respect to these six K-8 schools rests entirely on the arithmetical error that five of them fed 10-12 high schools. (A. 92).

It is true that girls in the four blackest K-8 schools had seat preferences only at the black Burke and Girls Highs, but the Court appears to have overlooked its prior finding that these schools were underutilized (A. 59), and its later finding that a seat preference at an underutilized school is of slight significance (A. 92-93). Girls at these four schools were as free to go to white (A. 91), underutilized (A. 100) East Boston High (9-12) as they were to attend Burke and Girls (A. 91). That they may have opted to follow their natural inclinations does not constitute petitioners segregationists. Moreover, it is noteworthy that in 1967-68 boys at the blackest of the K-8 schools, Dearborn, had a feeder pattern only to English (A. 91), then 4:1 white (A. 93), and that that limited, integratory option

was extended to the three next blackest K-8 schools the following year (A. 93, 95).

The Court criticized a second set of feeder pattern changes, for 1968-69. (A. 93) The criticism, to quote the District Court, does not withstand scrutiny. (A. 98) White Russell (A. 91) was given additional preferences at black Burke (A. 91) and Girls (A. 91) and at English (A. 94).* Prince, by then majority black and other-minority, received preferences, in addition to those already in effect to white Taft and white Edison (A. 91), to white English and black Girls (A. 94). Rice-Franklin, Lincoln, and Martin, three of the four blackest K-8 schools (A. 91) were given additional preferences which put them on the same footing as Dearborn (A. 94): boys to white English and girls having freedom of choice between white East Boston and black Burke or Girls.

Also criticized was the preference accorded to white Michelangelo Jr. High, in addition to the preference to then-white English, to white Charlestown High (A. 95-96). The Court did not see fit to mention that Charlestown was the only high school even remotely nearby Michelangelo.

With respect to the four middle schools (6-8), which opened black (A. 95), the Court seems to concede that they were educationally justifiable (A. 93), but finds fault with petitioners' apparent abandonment of the intended conversion of the entire intermediate system to middle schools (A. 94, 99). Three of these schools were accorded preferences at black Burke and Girls, and white English (A. 95). One of the three, McCormack, also received a preference at white South Boston High (A. 95), which was of significance because a preference was necessar[illegible] (A.

* This preference to then 4:1 white English is significant in that it belies the Court's ultimate conclusion that petitioners intended at that time to convert English from 4:1 white to all black. (A. 15, 101)

92-93) for admission to that overcrowded facility. (A. 59) The fourth and blackest of the middle schools, Lewis, lost its preference at disproportionately black Jamaica Plain High (A. 95) and became the intermediate component of the federally-funded "model demonstration subsystem" to which whites are bused from the suburbs free of charge. (A. 55, 95n).

The District Court's final criticism of feeder patterns, levelled at the deletion in 1968-69 of seat preferences at three other intermediate schools, (A. 95) is mystifying. White Wilson lost its preference at white Hyde Park, (A. 95) leaving only a preference at less predominantly-white Dorchester; (A. 92) black Lewenberg lost its preference at 26.5% black Dorchester, (A. 95) leaving only its preference to 95.5% white Hyde Park; (A. 92) and black Campbell lost its preference to Dorchester, (A. 95) to be left with preference only to then white English (for boys) and to black Burke and Girls (for girls). (A. 95)

The only possibly segregatory change that is discernable from the entire analysis of feeder patterns is the narrowing of the preference (A. 95) of girls who attended black Campbell Junior High to black Burke and Girls.* This change is offset by what the District Court expressly conceded to be a change tending to alleviate racial imbalance: the 1971 deletion of black McCormack as a feeder to black Girls and Burke and the then-black English, leaving only a preference at white South Boston High. (A. 97) The Court then snatched away this faint praise by noting that South Boston High was so white that black students, feeling unwelcome there, did not exercise the preference. (A. 97) Here, as elsewhere in the opinions below, petitioners were as damned if they did as they were if they didn't.

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* Even this deletion of the Dorchester option might be justified on the ground that Dorchester High was becoming blacker. By 1971-72 it was majority black (A. 59)

The conclusion from the foregoing morass, that petitioners "manipulated feeder patterns with segregatory effect" (A. 90) is incomprehensible. Reversal by the Court of Appeals must have been avoided by virtue of the very incomprehensibility and volume of this section of the District Court's opinion. (A. 87-104) The Court of Appeals devoted approximately three pages to the topic, (A. 14-16) apparently reluctant to cull relevant findings from other parts of the lower court's opinion. It saw fit only to describe the details as "incredibly complex," and to parrot the District Court's conclusion as clear "when the dust settled." (A. 15)

The District Court purports to have examined all feeder pattern changes of any consequence. (A. 96) What emerges is a pattern of according preferences to students in isolated districts of the city at the nearest schools, and of a large body of integratory changes in the city proper, offset perhaps by what appears in retrospect * to be an overbalancing of 4:1 white English and the abandonment of the proposed city-wide conversion to middle schools. If the foregoing constitutes "manipulation of feeder patterns with segregatory effect" (A. 90) then the distinction between de facto and de jure segregation, reaffirmed in *Keyes, supra,* is meaningless.

IV. Open Enrollment and Controlled Transfer**

This is the third and last of the areas described by the Court of Appeals as "matters as to which affirmative acts

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* The Court of Appeals notes that petitioners "by 1970, and certainly by 1971 [were] fully aware of the imbalancing consequence of feeder patterns." (A. 16) Imputing that knowledge to petitioners back in 1967 and 1968, when the actions complained of occurred, was not expressly undertaken.

** As noted above, these policies tended to dilute the impact of feeder patterns, as they enabled students to occupy any available seat in the entire system. (A. 89).

were most prominent." (A. 10)* Like the other two, it discloses no affirmative segregatory act.

Open enrollment, in effect from 1961 until August, 1971, permitted student transfers, regardless of race, to any school with a vacant seat. No suggestion was made that the policy was less than city-wide. *Cf. Bradley* v. *Milliken,* 338 F. Supp. 582, 593 (E.D. Mich. 1971), *aff'd* 484 F.2d 215 (6th Cir. 1973), *rev'd, sub. nom. Milliken* v. *Bradley,* —— U.S. —— (7/25/74), 94 S. Ct. 3112; *See, also, United States* v. *Board of School Comm'rs of Indianapolis,* 332 F. Supp. 655, 666 (S.D. Ind. 1971), *aff'd,* 474 F.2d 81 (7th Cir. 1973), *cert. den.* 413 U.S. 920 (1973); *Hobson* v. *Hansen,* 269 F. Supp. 401, 499-500 (D.D.C. 1967), *aff'd sub nom. Smuck* v. *Hobson,* 408 F.2d 175 (D.C. Cir. *en banc* 1969).

Controlled transfer, effective from 1971 on, limited such transfers to those which decrease racial imbalance. (A. 104). The courts below specifically found that open enrollment was adopted by petitioners in 1961 as an aid to integration, and that only thereafter did its possibly segregatory effects become evident.** (A. 17, 104). Criticism of petitioners' conduct in this area was thus necessarily confined to their *inaction* or *resistance* with respect to the abandonment of a policy after its alleged inefficacy as an

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* The lower courts appear to disagree *inter se* on the relative importance of the various sections. The District Court comments, with respect to the instant section:

> "The segregatory consequences of defendants' transfer policies, while by no means minimal, were small when compared to those caused by facilities utilization, districting and feeder patterns already discussed. Transfer applications are made and handled on an individual basis, whereas discrimination in facilities utilization, districting and the like affect large groups of students." (A. 104-105)

It will be recalled that the Court of Appeals downplayed the relative significance of districting. (A. 19)

** Thus distinguishing the instant case from *Spangler* v. *Pasadena City Bd. of Educ.*, 311 F.Supp. 501, 520-521 (C.D. Cal. 1970).

integratory tool became evident. (A. 108) In fact, the Court's own findings raise doubt that open enrollment had segregatory effects. The Court notes that during 1970-71 over 6700 pupils transferred under open enrollment, that 1028 of these were clearly segregatory, and that the effect of 3206 of these could not be determined because they were transfers from white to white or black to black. No mention is made of the remaining 2466, which of necessity were integratory. (A. 110-111)

The only "affirmative" action discussed in the entire section relates to petitioners' voluntary adoption in 1971 of controlled transfer, (A. 104), surely integratory. Here, as elsewhere, the courts below faulted petitioners not for doing something bad, but for not doing enough good. Specifically, the attack is upon certain exceptions to controlled transfer. (A. 112-116). While it is true that without the exceptions, the controlled transfer policy might have been a more effective tool of desegregation, it does not follow, nor did the Court find, that controlled transfer *cum* exceptions was worse than open enrollment.

V. Faculty and Staff

The District Court ruled that respondents had established all three of their claims in this area: (1) that petitioners knowingly pursued policies resulting in racial segregation of faculty and staff, reinforcing the racial identifiability of schools and increasing student segregation, (2) that petitioners knowingly pursued policies resulting in less qualified, less experienced and lower paid teachers in black schools, and (3) that petitioners discriminated in recruiting, hiring and promotion of teachers and staff. (A. 117-118)

Racial Segregation

As among students at many of Boston's schools, it cannot be denied that segregation exists among teachers. In 1972-73, more than two-thirds of Boston's black teachers (244) taught at the less than one-third of Boston's schools which were majority black (59). (A. 122-123) Eighty-one of Boston's 201 schools have never had a black teacher. (A. 124) All of the black principals (5) and assistant principals (14) work in majority black schools. (A. 124) On the other hand, no school had a majority black faculty. (A. 28)

That teacher imbalance exists so impressed the courts below that little attention was given to how it came about. The District Court attributed it first to requests by principals and headmasters for black teachers.* (A. 125) Rejected out of hand was testimony concerning the broadly-held view that black teachers serve as adult role models and inspirational examples to black pupils, (A. 126-127) and direct evidence that black teachers preferred placement in black schools. (A. 127)

The Court found a second cause of teacher segregation to be the tendency of permanent teachers who had taught at majority black schools for at least two years to exercise their transfer prerogative to transfer to majority white schools, (A. 125) pursuant to seniority provisions of the collective bargaining agreement with the teachers union, Local 66, AFT-AFL-CIO, in effect since 1966. (A. 118, 120)

The Court did not suggest that the seniority system of transfers was itself invidious, but that petitioners had administered the system in a segregatory manner. Specific-

* The Court noted that ten to fifteen principals make such racial requests per year. (A. 125) It is probably safe to assume that the five black principals are among those making such requests.

ally, the Court noted that, during 1971 and 1972, 39 of 100 applications for transfers from black schools to white schools had been approved, while each of two requests for transfers the opposite way were denied. (A. 125) Nothing was said about the color of the applicants, so nothing can be concluded about the effect on racial balance, and, more significantly, nothing was said about the 61 applications which were denied; if the granting of 39 requests can be said to be segregatory, then the denial of the other 61 must, of necessity, be integratory.

Unequal Education

The District Court demonstrated by means of tables (A. 128-129) that accompanying the higher rate of teacher turnover in predominantly black schools,* (A. 131) is a tendency for these schools to be staffed by less experienced teachers. (A. 128-130) Petitioners agree with the conclusion that a less experienced, or provisional, teacher is likely to be less qualified than an experienced, permanent teacher. The Court broadly concluded, however, that its charts suggest that the system may channel teachers into progressively whiter schools as their seniority increases. (A. 129) There was not a shred of evidence to support the necessarily veiled inference that petitioners brought about this state of affairs with segregatory intent; rather, it was shown to be the result of collective bargaining. (A. 118, 120) Moreover, petitioners' rejection of 61 of 100 segregatory transfer applications precluded such an inference. (A. 125)

Even if the transfer policy, which resulted in high teacher turnover and relatively inexperienced faculties at black schools, had been racially motivated, that fact, stand-

* This is, of course, a corollary of the seniority-geared transfer policy discussed *supra*. (A. 29)

ing alone, would not support the broad finding of unequal educational opportunity. (A. 132) Other factors, such as student/teacher ratios, expenditures, facilities, and programs, required for such a conclusion were not even considered. *Keyes* v. *School Dist. No. 1,* 445 F.2d 990 (10th Cir. 1971), *rev'd on other grounds,* 413 U.S. 189 (1973). *See, also, Johnson* v. *San Francisco Unified School Dist.,* 339 F. Supp. 1315, 1339-40, (N.D. Cal. 1971); *Hobson* v. *Hansen,* 327 F. Supp. 844, 854 (D.D.C. 1971); *Spangler* v. *Pasadena City Bd. of Educ.,* 311 F. Supp. 501, 514-515 (C.D. Cal. 1970).

Hiring and Promotion

In attempting to demonstrate that a disproportionately small percentage (3.5%) of black teachers, who comprised 5.4% of all permanent teachers, were promoted to administrative positions, the District Court inadvertently established that fourteen of the eighteen blacks thus promoted occupied the topmost administrative positions, principal and assistant principal (A. 132-133).*

Indeed, the Court did not even document what it set out to prove, because of its subsequent finding that only one percent of faculty was black in the early 1960's. (A. 138) Neither that low figure, nor the 4-6 year experience requirement for promotion, was found to be discriminatory (A. 137), so it follows that the percentage of blacks filling administrative positions is hardly surprising in light of the reasonable experience requirement and the small size of the pool of eligible blacks. Overall, the promotional process thus appears to have favored blacks.

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* Elsewhere in the opinion, the Court described the ascent of a black teacher to assistant superintendent outside the regular promotional system (A. 135-136)

"[Respondents] complaint concerning [teacher] hiring practices rests largely upon [petitioners'] misuse of the National Teachers Examination (NTE)" (A. 133). The District Court found that permanent teachers are selected from eligible lists and offered positions in the order of their ranking,* which is determined by scores comprised of three components: The results of the written examination, a personal interview, and credentials. (A. 133) One searching for intentional, invidious segregation would expect to direct his attention to the interview as tailor-made for weeding out blacks, but the complaint here is not that the interview counted too much. Rather, it is that the interview did not count *enough*, even after the cut-off score on the exam was dropped from 560 (of a possible 800) to 400 to 320 and the weight given to the interview and credentials increased correspondingly. (A. 135n)

The Court's route to the conclusion that the NTE is misused is typical of other strained conclusions throughout the opinion: First, because Educational Testing Service (ETS) of Princeton, N.J., which prepares the NTE, recommends that NTE scores not be the determining factor as to who is hired and who is not; And, because an applicant's total rank score (NTE, interview, credentials) in practice has an almost perfect correlation to the NTE score; It then follows, as a practical matter, that whether and in what order applicants are hired depends almost entirely on NTE performance. (A. 134) It never occurred to the District Court that what happened in practice tended to prove that the interview criteria and credentials affected NTE results. Those very real prerequisites to hiring were totally dismissed from existence when it was

* Prior to the adoption of the NTE in 1970, the Court found that the systems of hiring, promotion and transfering teachers were "color-blind" in that there was no reference to race on forms or in the teacher's file. (A. 118)

noticed that total score happened to have a high correlation to the examination score. There was no evidence or suggestion that the interviewers and evaluators of credentials were rubber-stamping the NTE results; merely that the results happened to correlate. Also forgotten was the prerequisite to the examination itself: Certification by the State Board of Education requiring a bachelor's degree from an accredited college plus certain courses of study and semester hours. (A. 119)

Respondent's real complaint with the NTE is, of course, that blacks do not happen to score as well on it as whites. (A. 135) The District Court concluded, relying on *Castro* v. *Beecher,* 459 F.2d 725 (1st Cir. 1972), that the effect of the cut-off score was to eliminate more blacks than whites. (A. 135) Short of eliminating the exam entirely, which was not suggested, all that could be done to accommodate blacks is to *reduce* the cut-off score, and that is what petitioners did twice. The passing score was reduced in 1972 to 400 (50%) and to 320 (40%) in 1973. (A. 135n) Respondents' complaint is simply that that was not enough.

The complaint respecting recruiting of black teachers is similar. The District Court noted that petitioners' budgeting for minority recruitment dropped from $60,000 in 1970-71 to $34,000 in 1971-72. (A. 136) Similarly found insufficient was the authority extended to petitioners' minority recruiters to employ black teachers at the provisional level. Apparently, respondents and the Court consider petitioners' failure to authorize the recruiters to offer *permanent* positions, thus bypassing the examination, interview, and credentials process, to be an act of segregation.*

* The authority conferred on the recruiters to guarantee employment at the provisional level, which raises problems of reverse discrimination, is actually thrown back at petitioners as a segregatory act. At A. 126 the Court complained, in connection with transfer policies, that so many blacks (one-third) are provisionals. A preference which does not go far enough thus becomes segregatory.

(A. 136) Finally, totally dismissed as the exception to the rule is petitioners' acceptance of sixty black provisionals trained under a federally-funded program. (A. 119, 136)

If petitioners' failure to make a sufficiently "wholehearted" (A. 135) effort to recruit blacks, and their "slow" response (A. 138) to problems in the promotional system were affirmative acts of segregation, probative of de jure segregation, then, as noted above, Mr. Justice Powell's dissent in *Keyes* has become the law.

VI. Examination and Vocational Schools

It will be recalled that the section on feeder patterns dealt with eleven of Boston's eighteen high schools. (A. 89-90) Of the remaining seven, segregation was not found to exist at two: Copley Square High and Boston High, (A. 89) and the remaining five are dealt with separately because they are specialized and open citywide.

Until 1973, Boys Latin, Girls Latin and Boston Technical, each disproportionately white, admitted students strictly by competitive, (A. 139) achievement-type (A. 14) examination without regard to race. While there was no specific evidence that the examinations discriminated against blacks, there was evidence that blacks fared worse on the examination than whites. (A. 141) On the other hand, it was found that petitioners, faced with charges of such discrimination, converted in 1973 to an ETS, aptitude-type of exam and reserved 112 seats at the schools for students from under-represented districts. (A. 27, 141-142)*

Boston Trade and Girls Trade, open citywide without examination, are majority black, (A. 139) while part-time, cooperative vocational programs are offered, also open

*Raising questions of reverse-discrimination not developed here. *See, DeFunis* v. *Odegaard*, 82 Wash.2d 11 (1973), *cert. dismissed*, 414 U.S. 1038 (1974).

citywide, at six district high schools, five of which are predominantly white. (A. 142) The training offered in the district high school vocational programs is very different from that offered by the two Trade schools and there are educational advantages to each type of program. (A. 143) The District Court admitted that there was little evidence on the issue of whether discrimination at the Trade schools was purposeful. (A. 144)

Unable to draw any conclusions from this state of evidence as to the origins of segregation in the examination and vocational schools, the District Court relied, unabashedly, on the *Keyes* presumption that "a finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious." (A. 23-25, 140).

The *Keyes* presumption was applied as follows:

> "The district court found no part of the Boston school system to be geographically isolated. Since defendants' policies with regard to new facilities, portable classrooms, overcrowding, districting and redistricting, feeder patterns, open enrollment and controlled transfers, and faculty and staff were all marked by segregative intent, the existence of a dual system was established. The effects of that system, in any school, including the examination and trade schools and the vocational programs, must be eliminated." (A. 25).

Petitioners respectfully submit that the foundation for application of the *Keyes* presumption was misapprehended by the courts below. If this Court's words "substantial portion" and "meaningful portion" in *Keyes* are themselevs meaningful, and if the District Court's findings are

recognized for what they are, all chaff and no wheat, then there exists no basis for the presumption.*

Conclusion

It bears repeating that the foregoing analysis of the opinions below is intended not to bring mere error to the Court's attention, but to demonstrate the pervasive effect of a totally unlawful standard of de jure segregation.

There is a third reason for granting the writ which appears between the lines of the record. The Court of Appeals noted the existence of "unrest" and that Boston is "riven with controversy." (A. 34)

Resistance from both races to forced busing does not abate, in large part because the citizens of Boston do not view the case as over.** Hopes, perhaps false, but hopes nonetheless, were rekindled when President Ford announced, on national television, his own disagreement with the District Court's decision. Even Boston's two daily newspapers, both of which support the decision, have focused upon this Court as the end to the controversy.

> "[T]he crisis that has erupted in our schools and divided the city's people isn't likely to end until the issue is resolved once and for all by the Supreme Court.
>
> "The high court has, of course, handed down a number of school desegregation decisions in the past

* Moreover, the examination feature at the Latin Schools and Technical preclude a finding of any rational connection between the fact proved and the ultimate fact presumed. *See*, *Tot v. United States*, 319 U.S. 463, 467 (1943). Instead, the validity of the exam should depend on whether it substantially furthers the purpose of providing the best education possible, provided it is not racially motivated. *Berkelman* v. *San Francisco Unified School Dist.*, 501 F.2d 1264 (9th Cir. 1974).

** Indeed, District Court proceedings on remedies continue to date.

20 years. But the precedents and principles involved in those cases may not apply exactly to the situation here.

"The chances that the Supreme Court will reverse Judge Garrity's decree are perhaps 'remote,' as the Mayor has conceded. But whether it sustains or overrules the decree, its decision will be final.

"Then and only then, as the Mayor remarked, will the tension, the doubt and the uncertainty hovering over Boston's schools begin to subside. Only when every legal avenue of appeal has been exhausted and the debate has ended, as he put it, can we hope to restore order and resume the vital task of educating our children." Editorial, *Boston Herald American*, December 31, 1974.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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SUPREME COURT, U. S.

MAR 19 1975

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1188

JOHN J. KERRIGAN, ET AL.,
PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
RESPONDENTS.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 74-1251

TALLULAH MORGAN et al.,
PLAINTIFFS, APPELLEES,
v.
JOHN J. KERRIGAN, et al.,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[379 F. Supp. 410 (D. Mass. 1974)]

Before COFFIN, *Chief Judge*
MCENTEE and CAMPBELL, *Circuit Judges.*

John O. Mirick, with whom *Hale and Dorr* was on brief, for appellants.

Laurence S. Fordham, with whom *John Luebsdorf, Foley, Hoag & Eliot, J. Harold Flannery, Robert Pressman, Eric E. Van Loon, Roger I. Abrams, Thomas M. Simmons, Collins & Simmons*, and *Nathaniel R. Jones*, were on brief, for appellees.

December 19, 1974

COFFIN, *Chief Judge.* Two decades after *Brown* v. *Board of Education*, 347 U.S. 483 (1954): the refractory issue of school desegregation for Boston reaches this court. It reaches us after scores of cases have been litigated and decided in the South, where state laws and constitutions had effectuated a dual school system along racial lines. Perhaps more relevantly, it reaches us after a number of decisions affecting northern cities where segregation had

often resulted from local practices rather than laws.[1] Most significantly, this case comes to us (and the district court) only after passage of a state Racial Imbalance Act in 1965, Mass. G.L. c. 71, §§ 37C, 37D,[2] and almost a decade of litigation before the courts of Massachusetts and state and federal administrative bodies.[3]

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[1] *See, e.g., Milliken* v. *Bradley*, 94 S. Ct. 3112 (1974) (Detroit); *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973) (Denver); *Brinkman* v. *Gilligan*, 503 F.2d 684 (6th Cir. 1974) (Dayton); *Oliver* v. *Michigan State Bd. of Educ.*, ___ F.2d ___ (6th Cir. Dec. 9, 1974) (Kalamazoo); *Berry* v. *School Dist.*, ___ F.2d ___ (6th Cir. Nov. 1, 1974) (Benton Harbor, Mich.); *United States* v. *Board of School Comm'rs.*, 474 F.2d 81 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973) (Indianapolis); *Kelly* v. *Guinn*, 456 F.2d 100 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973) (Las Vegas); *Davis* v. *School Dist.*, 443 F.2d 573 (6th Cir. 1971) (Pontiac); *United States* v. *School Dist. 151*, 432 F.2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971) (Cook County, Ill.); *Clemons* v. *Board of Educ.*, 228 F.2d 853 (6th Cir.), *cert. denied*, 350 U.S. 1006 (1956) (Hillsboro, Ohio); *Taylor* v. *Board of Educ.*, 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961) (New Rochelle); *Booker* v. *Special School Dist. No. 1*, 351 F. Supp. 799 (D. Minn. 1972) (Minneapolis); *Spangler* v. *Pasadena City Bd. of Educ.*, 311 F. Supp. 501 (C.D. Calif. 1970).

[2] The origins of the statute are discussed, and the essence of its provisions set out, in the district court's opinion, 379 F. Supp. at 417-18. The Act was amended, after the district court opinion was filed, to limit sharply the measures which the state board may employ in attempting to bring about racial balance in the schools. St. 1974 c. 636 (July 26, 1974). The Massachusetts Supreme Judicial Court recently considered these amendments, and found that they would be unconstitutional if interpreted to reverse or impede the progress toward the achievement of racial balance in a city already subject to a state court order that a racial balance plan be implemented. *School Comm.* v. *Board of Educ.* (Nov. 12, 1974) (Springfield). Since the district court's opinion is founded upon the federal constitution, the merits of this appeal would in no event be affected by the amendments.

[3] The district court's opinion, 379 F. Supp. 410, 418-21 (D. Mass. 1974), contains a succinct summary of this history of litigation, involving seven decisions of the Massachusetts Supreme Judicial Court, three decisions of a Single Justice thereof, a number of Superior Court proceedings, a decision of a federal Administrative Law Judge resulting in the withholding of many millions of dollars in federal educational assistance funds and, at 379 F. Supp. at 450-51, a discussion of the decision of the Massachusetts Commission

Despite rulings in most of these cases requiring affirmative action to comply with state law or with the federal constitution, little took place in Boston other than continued litigation. This action was filed in March, 1972, by black children attending the Boston public schools and their parents (later certified as proper representatives of the class of all such parents and children) against the Boston School Committee, its individual members, and the Superintendent of the Boston Public Schools (the "city defendants" and appellants) and the Board of Education of the Commonwealth of Massachusetts, its individual members, and the Commissioner of Education (the "state defendants")[4] Plaintiffs sought declaratory and injunctive relief, alleging that various actions of the city defendants, hereinafter discussed, denied black children both the equal protection of the laws: and equality of educational opportunity, in violation of the Thirteenth and the Fourteenth Amendments and federal civil rights statutes.

I. The Decision of the District Court

The district court made an exhaustive inquiry into the operations of the Boston School system. The parties cooperated in arriving at stipulations of undisputed facts and in facilitating the admission into evidence of depositions and testimony from prior proceedings. The introduction of live testimony and depositions from some thirty witnesses took fifteen trial days, and over 1,000 exhibits were pro-

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Against Discrimination, finding discrimination in the Boston School Committee's open enrollment and controlled transfer practices.

[4] The state defendants, whose position on most issues was identical with that of plaintiffs, were found not to have intentionally contributed to racial segregation in the Boston public schools. On the contrary, the court held that they had done all that was possible under their limited authority to compel the city defendants to obey the state law and the federal constitution. The court, however, retained the state defendants in the case to help in the formulation and implementation of remedies. The state defendants have not appealed. Where unqualified reference is made to "defendants" in this opinion, only the city defendants are embraced by the term.

duced. The court then painstakingly set forth the complex factual background, the reasoning leading to its findings, and its conclusions of law in a lengthy opinion issued June 21, 1974. *Morgan* v. *Hennigan*, 379 F. Supp. 410 (D. Mass.).

The court dealt not only with the fact of segregation in the Boston Schools, but with whether segregation was due to deliberate and purposeful discrimination by Boston school authorities. The "segregative intent" of school officials has been a legal issue of importance in school desegregation cases. *See Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973). This is so because under the Constitution, no state may deny to its citizens the equal protection of the laws, and a school system segregated by the deliberate design of local authorities reflects the action of the state or municipality as surely as if segregation had been required by statute. Having found such deliberate design, the court left the question of remedy to a future time. This appeal is therefore limited to the court's findings and conclusions relating to purposeful segregation.

In its opinion the court, after reviewing the background of litigation we have noted, n. 3 *supra*, described the structure and powers of the Boston School Committee and the complex organization of schools under its command—a mixture of schools serving districts and schools serving the entire city, some on the basis of examinations and some not; a combination of three methods of grade progression (8-4; 5-4-4; 6-3-3); and, in addition to elementary, "middle" (grades 6, 7 and 8), junior high (grades 7, 8 and 9), and high schools, special schools such as "magnet" schools, a model demonstration system, and vocational schools. The court next found that while the 1971-1972 public school enrollment comprised 59,300 whites (61%) and 30,600 blacks

[5] Non-black minority students comprise approximately 7% of the city's public school population, but no issues with regard to possible discrimination against these students were presented to or considered by the district court. *See* 379 F. Supp. at 415 n. 1.

(32%),[5] this ratio was approached in few of the schools, whatever their geographic area, grade level or type.[6] This fact of racial imbalance in the public schools led the court to inquire "whether the defendants have intentionally and purposefully caused or maintained racial segregation in meaningful or significant segments of the Boston public school system, in violation of the Fourteenth Amendment." 379 F. Supp. at 425. The court looked at defendants' actions in six areas: (1) facilities utilization and new structures, (2) districting and redistricting, (3) feeder patterns, (4) open enrollment and controlled transfers, (5) faculty and staff, and (6) vocational and examination schools.

It found: as to (1), "affirmative acts . . . related to overcrowding which . . . intentionally created or maintained racial segregation" (379 F. Supp. at 427); as to (2), that, while defendants made no changes to bring about segregation where there was none before, they made at least one change to perpetuate racial segregation; consistently rejected proposals to redistrict for racial balance, being aware of the racial impact of their actions, while engaging in redistricting when no racial implications were involved; and finally, to meet pressure from the state Board of Education and the courts, proposed a review of all district lines and a comprehensive plan for achieving racial balance, only to sabotage both proposals; as to (3), that defendants inaugurated changes in feeder patterns for the 1967-1968 and 1968-1969 school years, with knowledge of the probable consequences and "for the purpose of promoting racial segregation" (379 F. Supp. at 449), which routed black students

[6] Of eighteen high schools, only two came close to that ratio. All of the five citywide special examination and trade schools were either overwhelmingly black or overwhelmingly white. The four middle schools were from 63% to 94% black. Only two of the fifteen junior high schools approached the overall student ratio, the others being predominantly white or black. Only five of some 140 elementary schools came within 10% of the overall 61:32 ratio.

into high schools beginning with a ninth grade while white students, equipped with transfer options, were channeled into high schools beginning with tenth grade; as to (4), that "open enrollment and controlled transfer policies were managed under the direction of the defendants with the singular intention to discriminate on the basis of race" (379 F. Supp. at 455).

The court, addressing the issues relating to faculty and staff, found that 74 percent of the system's 356 black teachers and all black principals and assistant principals were in predominantly black schools. After scrutinizing the record and policies as to transfers, the exclusive dependence on a written examination for hiring, and the obstacles to promotion of administrators, the court held that plaintiffs had established their equal protection and equal educational opportunity claims and also their claim that defendants violated their right to have the school system operated free of racial discrimination in the selection and promotion of teachers and staff. Finally, seeing the high degree of segregation in the city's elite examination high schools and trade schools, the former white, the latter black, the court relied on the presumption of intent recognized in *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 207-11 (1973), which it found unrebutted. Other findings and conclusions will be discussed where relevant.

II. The Basic Challenge: The Standard of Judgment

Defendants do not challenge the findings below as to the extent of racial segregation in Boston's schools. Nor do they, in the main, challenge findings as to what they have done or not done. Their position is that the present segregation is not a product of their intent, but is "due to factors over which the city defendants have had and have no control, or is due to the policy of providing neighborhood schools, a policy which long predated any segregation now complained of, which city defendants claimed was constitu-

tionally permissible.'"[7] Defendants view the proof as establishing only that "the city defendants were faced with a school system in which considerable de facto segregation existed, and continued to operate that school system without taking affirmative action to counteract that de facto segregation." Throughout their brief and argument, they characterize their conduct as "mere inaction" or "mere failure to take affirmative action."

We note, but leave for later discussion, the fact that the district court made a number of findings based on the initiation of new actions and policies which could hardly be termed "mere inaction", *e.g.*, feeder patterns, open enrollment and controlled transfer policies. Thus the district court's findings of intentional discrimination have support quite apart from the evidence of inaction. To some extent, however, the district court, as in its treatment of defendants' approach to redistricting, did place emphasis on the Committee's rejection of all proposals to redistrict when the failure to do so would predictably increase or perpetuate segregation.

We therefore deal with defendants' basic contention that school authorities in a northern city which has never had a statutory dual school system cannot be found to have violated the constitution unless they have taken affirmative acts which have brought about segregation in the schools. We have carefully considered this argument, since it is the one

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[7] Before the district court the city defendants also raised the similar defense, alluded to in this quotation from their brief, that they were entitled to adhere to a neighborhood school policy, which would be constitutionally valid despite any segregative consequences. The district court pointed out that several practices of the defendants were antithetical to such an asserted policy: extensive busing, open enrollment (and, we add, controlled transfer), multi-school districts, magnet schools, citywide schools, and feeder patterns. 379 F. Supp. at 473. Moreover, the court noted, the elementary district map is inconsistent with the neighborhood concept, schools being located near the edges of districts rather than near the center. Defendants have not stressed this defense on appeal.

put forth most vigorously in this appeal, and have found it to be without support. The controlling test is that propounded in *Keyes,* where the relevant inquiry is described as an effort to determine whether the authorities' "policies and practices . . . were . . . taken in effectuation of a policy to create or maintain segregation." 413 U.S. at 213-14 *See also* 413 U.S. at 198 ("brought about or maintained by intentional state action"); at 211 ("create or contribute to the current segregated condition"); at 214 ("policy to create or maintain segregation").[8] That is, *Keyes* does not merely speak to those activities which cause or bring about segregation, but proscribes as well efforts to maintain segregation which may in the first instance be attributable to outside forces. And neither *Keyes,* which speaks in terms of "policies and practices", nor the cases which went before it support the suggestion that official policies and decisions which do not call for affirmative actions may not be considered by a court when it determines whether segregation has been intentionally promoted or maintained. "Every act of a school board and school administration, and indeed every failure to act where affirmative action is indicated, must now be subject to scrutiny." *Keyes,* 413 U.S. at 234 (Powell, J., concurring in part and dissenting in part); *id.* at 230 (the Court "searches for *de jure* action in what the

[8] These passages from *Keyes* obviously find their antecedent in *Swann* v. *Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1 (1971). At 202, *Keyes* quotes from *Swann*, at 20-21, which refers to choices of the school authorities as to school location and various techniques of student assignment, and states that they have been "used as a potent weapon for creating or maintaining a state-segregated school system."; that sometimes new schools were built in white areas "farthest from Negro population centers in order to maintain the separation of the races" (*Keyes* at 203, quoting 402 U.S. at 20-21); and that merely neutral assignment plans "may fail to counteract the continuing effects of . . . location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation." (*Keyes* at 212, quoting 402 U.S. at 28).

Denver School Board has done or failed to do") (Powell, J.).

Not only is it inconceivable that the repeated rejection of proposals which would promote desegregation could not properly be considered by a court as evidence of an intent to create or maintain segregation, but there can be no doubt that defendants' failures to act are probative evidence of intent when it is remembered that they labored under the specific legal obligations imposed by the Massachusetts Racial Imbalance Act. "Plainly, where public issues are framed and questions posed which bear directly on the quality of education, a deliberate negative response from school authorities or a deliberate omission to act, can affect the shape of subsequent circumstances just as materially as can affirmative decisions and action. State responsibility under the United States Constitution must logically be and is fixed in either context." *Oliver* v. *Kalamazoo Bd. of Educ.*, 368 F. Supp. 143 (W.D. Mich. 1973), *aff'd sub nom. Oliver* v. *Michigan State Bd. of Educ.* (6th Cir. Dec. 9, 1974); *Kelly* v. *Guinn*, 456 F.2d 100 (9th Cir. 1972) (school district had continued a neighborhood school policy at the elementary level); *Spangler* v. *Pasadena City Bd. of Educ.*, 311 F. Supp. 501 (C.D. Calif. 1970).

If the school administrators of a community were allowed so to deal with a changing school population that the old segregative profile would not only persist but be sharpened, there would be little hope for desegregation anywhere. In short, when administrators face the problems of managing a dynamic system, they seldom have the luxury of "mere inaction". Every decision to act for racial balance or to fight it has consequences.[9] Thus we think the district court,

[9] The unreality of the action-inaction dichotomy has been underscored by Mr. Justice Powell's opinion, concurring in part and dissenting in part, in *Keyes*, *supra*, 413 U.S. at 234-35:

> "The most routine decisions with respect to the operation of schools, made almost daily, can affect in varying degrees the

in determining segregative intent, could properly take account of School Committee decisions not to act as well as its decisions to act affirmatively.

III. Policies and Practices Affecting Placement of Students

We turn now to the district court's findings and conclusions bearing on distribution of students within the school system. We leave the separate issue of faculty and staff issue until last. We deal first with matters as to which affirmative actions were most prominant—measures dealing with growth of student population, structuring the flow of students, and permissive student options. We then consider redistricting (and the refusal to redistrict) and the issue of examination and vocational schools where liability was predicated on a presumption of intent.

A. *Dealing with Growth of the Student Population*

One of the present facts of life in the Boston school system is that where there is overcrowding, it generally occurs in white-majority schools while underutilization, where it exists, is found only in black-majority schools.[10]

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extent to which schools are initially segregated, remain in that condition, are desegregated, or—for the long term future—are likely to be one or the other. These decisions include action or nonaction with respect to school building construction and location; the timing of building new schools and their size; the closing and consolidation of schools; the drawing or gerrymandering of student attendance zones; the extent to which a neighborhood policy is enforced; the recruitment, promotion and assignment of faculty and supervisory personnel; policies with respect to transfers from one school to another; whether, and to what extent, special schools will be provided, where they will be located, and who will qualify to attend them; the determination of curriculum, including whether there will be 'tracks' that lead primarily to college or to vocational training, and the routing of students into these tracks; and even decisions as to social, recreational, and athletic policies."

[10] Charlestown, Hyde Park, Roslindale, and South Boston High Schools as well as Cleveland, Graven and Rogers Junior High Schools, each with between 84 and 99 percent white students, are overcrowded. In addition, Dorchester High, the exception to the rule, with 52 per-

Defendants, in meeting the problem of overcrowded schools, have utilized three principal techniques. These are reassignment to other schools, use of portable classrooms located adjacent to the main school building, and the building of new school buildings or additions.[11]

The district court found students in 91 percent white Cleveland Junior High School were reassigned to 99 percent white South Boston High which ultimately suffered from overcrowding, although the racial balance of other closer schools, with vacant seats, would have been improved by receiving such students. The court also found that students from overcrowded schools were sometimes transferred to alleviate overcrowding, but only where racial balance was not affected.[12] The explicit reason given by top school officials for not assigning whites to black-majority schools was that this would "create a problem" on the part

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cent black students and 46.8 percent white students is also overcrowded.

Boys Trade, English High, Girls High, Jeremiah Burke High, King Middle School and Timilty Junior High School, each with 66 to 95 percent black students, have a substantial number of vacant seats. The pattern was also observable at grade school levels. 379 F. Supp. at 426. The district court points out that some cases were extreme and dramatic. South Boston High, all-white, was over enrolled by 676 students in the 1971-1972 school year; at the same time 92 percent black Girls High was underutilized by 532 places.

[11] A fourth is busing. While the school board has balked at mandatory busing for whites, a great deal of voluntary busing has been undertaken in Boston. In addition to the regular busing of one third of Boston's students, primarily to high schools, there were voluntary programs aimed at improving integration. The Metco and Exodus plans involved the busing of black school children to the suburbs of Boston. In addition, the only mandatory busing that took place was busing of black elementary school children for the short time that the Weld School was open. Although the policy had been one of voluntary busing, the parents of black students were given no choice when their children were bused distances of up to two miles.

[12] Bradford-Wolcott students (blacks) were transferred a mile and one-half to the Weld School which opened 87 percent black even though it was in a white locale. And the district court found that similar transfers, alleviating overcrowding but not improving racial balance, were made from English High to Roosevelt and Edison Schools from 1964 to 1970.

of white parents. This, we observe, is an endemic problem, but public clamor has long been deemed beyond the pale as justification for racial segregation. *E.g., Cooper* v. *Aaron*, 358 U.S. 1, 15-16 (1958).

The same policy was apparent in the use of portable classrooms.[13] Of 46 such classrooms in use in 1972-1973, 37 were used at schools with white majority of 70 percent or more, five at schools with a white majority of 50 to 70 percent, and only four at black-majority schools. The School Committee turned a deaf ear to proposals of both the Kiernan Report in 1965 and a state task force report in 1966 that portables be used to reduce segregation, on the ground that portables were "educationally undesirable"; but during each of those years it used portables to perpetuate the racial mix that existed.

In its jousts with the state Board of Education, the School Committee held out hopes of new facilities as an adequate means of advancing racial balance. Its performance was not spectacular. Of twenty new openings between 1967 and 1972, nine buildings opened with a 60 percent or more black majority; seven opened with an 87 percent or more white majority; four opened with an enrollment ranging from 40 percent black to 40 percent white. The district court analyzed in some detail the circumstances surrounding the opening of four schools: Weld, which opened largely black, despite the fact that it was in a white neighborhood and there was the possibility of taking more whites and moving black children to white schools; Hennigan, also largely black on opening through ineffectual efforts to recruit white volunteers, the efforts known to be ineffectual far in advance of opening; Lee, its opening on a balanced basis foreseeably doomed by publicized options to whites to attend over-

[13] To some extent the use of portables to relieve overcrowding was necessitated, as noted above, by the failure to utilize available seats in nearby schools.

crowded Fifield and O'Hearn, the option belatedly and secretively revoked shortly before opening, the result being chaos when 200 blacks illegally registered on opening day; and new English High, first intended for the enrollment of students of old English (largely black), then switched by the Committee at a later date for the Girls Latin student body (largely white), then forced by a Massachusetts court decision to revoke its "unilateral" decision.[14]

Appellants object to being held responsible for these contributions to imbalance, saying that they do not control the building process, that the population profile of the areas served by the new schools changed radically between the time of planning and the time of opening, and that much of the result was brought about by student pressure. The district court observed, however, that the Superintendent of Schools had a veto power over site selection, that appellants had the benefit of demographic predictions which proved remarkably accurate, and that the student pressure, where it existed, was a crisis of the Committee's own making.

We conclude that this pattern of selective action and refusal to act can be seen as consistent only when considered against the foreseeable racial impact of such decisions. Moreover, this pattern has been accompanied by statements of express intention not to counter anti-integration sentiment. We think the district court was clearly correct in this finding of affirmative action. The actions of the Boston authorities are not distinguishable from what the Supreme Court has termed the "classic pattern of building schools

[14] Plaintiffs assert that the court could have pointed to other examples. Defendants complain that the court ignored evidence or failed to make sufficiently specific findings rejecting evidence. We juxtapose these observations merely to note that the court must make sufficient findings; it does not have to make findings on every proposition put to it by the parties. *See* 9 Wright & Miller, Federal Practice and Procedure § 2579 (1971); Moore's Federal Practice ¶ 52.01[5]. Moreover, the question on appeal is whether the record as a whole supports the district court's findings of fact. Rule 52 Fed. R. Civ. Pro.

specifically intended for Negro or white students." Swann supra, 402 U.S. at 20-21.

B. *Structuring Flow of Students: Feeder Patterns*

By "feeder patterns" is meant the system of moving students from the elementary schools ending in grade eight, junior high schools, and middle schools to high schools. The methods of accomplishing this transition include seat assignments, preferences and options. After attending lower grades in a district system, students are channeled through a feeder pattern to a particular high school. High schools, then, do not have geographic boundaries as such, but are supplied with students by feeder patterns. 379 F. Supp. at 441. Although not part of the "feeder pattern" as such, a determination of what schools are attended prior to high school has a vital impact on the choice of high school for any individual student. Certain high schools are three year schools (grades 10-12), while others are four year schools (grades 9-12).[15] Prior to high school, i.e., before application of a "feeder pattern", children may attend elementary schools ending in grade eight or a middle school ending in grade eight or a junior high ending in grade nine. By creating black middle schools, the School Committee assured that the most natural way to channel the graduates of those schools would be into four year schools and away from three year high schools. In particular, with the conversion of two black junior high schools (Lewis and Campbell) to

[15] Boston has 18 high schools. Nine are theoretically fed by all intermediate schools, junior highs and middle schools throughout the system. Six are examination schools (discussed *infra*); one is a special program school; the remaining two are general schools, English High and Girls High. The nine remaining schools, Brighton, Burke, Charlestown, Dorchester, East Boston, Hyde Park, Jamaica Plain, Roslindale and South Boston are fed only by designated intermediate schools. Citywide, only English and Girls High include 9th grade. Of the district high schools only East Boston, South Boston and Burke for girls include 9th grade. The six district schools containing grades 10, 11, and 12 can be fed only by junior highs.

middle schools [16] and the channeling of their students into English, Girls High and Burke, it was not surprising that the latter became increasingly black. In addition, beginning in 1967, new feeder patterns were estabilshed and further refined in 1968. They amounted, according to the district court, to a "redistricting" of several high schools.

The details are incredibly complex. For a thorough analysis, *see* 379 F. Supp. at 442-46. But the results, when the dust settled, were clear: (1) graduates of heavily white kindergarten through eighth grade schools (Cheverus, Russell and Parkman) were given seat preferences at white high schools; and while white graduates of schools ending in grade eight (Prince, Thompson, McCormack and Russell) were given seat preferences at high schools where black students were given seat preferenecs as well—English, Burke and Girls High, they were also given options of attending white high schools; (2) graduates of heavily black schools ending in grade eight (Martin, Dearborn and Campbell) and heavily black and other minority schools (Lincoln-Quincy, Rice-Franklin) were given seat preferences only at English, Girls, and Burke; (3) students at identifiably white Michelangelo Junior High, which had fed only English for several years, were given an option of attending identifiably white Charlestown when the segregatory options started to take effect at English; (4) white students almost invariably used the options available to them to escape black schools. While this is only a brief summary of major actions taken, the consequence, particularly upon English High, was, as could have been predicted from even cursory analysis of the pattern, a rapid change in racial composition.

Appellants object to the drawing of inferences from these

[16] In 1967 Lewis and Campbell had among the highest percentages of black students of junior highs in Boston. 379 F. Supp. at 444 n. 23. The change to middle schools began in 1968-1969. McCormack, previously grades 4-8, located near Columbia Point, was designated a middle school as was Thompson, previously grades 1-8.

results. They assert that the initial motivation of feeder patterns was to aid integration, that feeder patterns encouraged blacks to attend white-majority schools, and in any event were a long standing procedure, antedating 1967. But the court found that the Committee by 1970, and certainly by 1971, was fully aware of the imbalancing consequences of feeder patterns, that the availability of options to whites and the relative unavailability of options to blacks predictably frustrated any integration, and that, before 1967, there was no evidence of well recognized patterns generally followed. In addition, the court found, and the record supports its finding, that the only consistent basis for feeder pattern designations, changes and deletions was the racial factor, and that no school committee justifications pertaining to the educational or safety needs of the school children withstood scrutiny. For example, the supposed educational justification for opening middle schools was undermined by the fact that after the four heavily black middle schools opened Boston dropped the plan for other students.

Here again, we see no inaction but new initiative, explained only by a racial objective. The district court's language was strong and clearly correct, given the facts: "The consequence of the feeder pattern changes and discriminatory options, in combination with the opening of four middle schools, was altogether foreseeable, almost immediate, and well-understood by the defendants: a dual system of secondary education was created, one for each race. Black students generally entered high school upon completion of eighth grade and white students upon completion of the ninth." 379 F. Supp. at 447-48.

C. *Permissive Student Options*

Superimposed on this Byzantine system was the option for individual students to enroll in schools to which they would not normally be assigned. The concept originated in

1961, the hope then being that integration would be advanced. In the years following, however, it became clear that the Committee would resist every suggestion that these options be restricted to those which would contribute to racial balance and would encourage the use of these options to foster segregation in Boston's schools. Defendants attempt to make here a variation of the argument they have clung to throughout this case. They say that they instituted open enrollment for integrative purposes—and that is where the court's exploration should end. The good motive at the outset sanitizes, they argue, all the consequences of their activity, any subsequently developed motivation or acquired knowledge, and all subsequent actions consciously promoting segregation. The rest was mere inaction. We, like the district court, find little to recommend that argument on the facts presented.

We start with a short history of the open enrollment policy. Soon after it was adopted in 1961 it became apparent that whatever the original motivation had been, white students were using the transfers to escape from schools where there were high concentrations of minority students. From 1966 to 1971 there was an intense but unsuccessful effort on the part of the state, acting under the Massachusetts Racial Imbalance Act, to compel a limitation on transfers. The defendants were intransigent. In 1971, in order to achieve the release of state funds withheld because of violation of the law, defendants finally agreed to prohibit transfers which would increase imbalance as defined by the act. The court below paid special attention to this chapter of the School Committee's history, finding it illuminative of the reasons for the actions taken.

In 1966, for a ten day period, the School Committee amended the open enrollment policy to prohibit transfers aggravating racial imbalance. This action was taken in

light of the withholding of state funds and rejection of the defendants' 1965 racial imbalance plan. When the state Board did not revoke its disapproval of the plans, in the wake of the limitation of transfers, the Committee met and acted. It rescinded the limitation. No change in the underlying segregative policy of open enrollment was made during the remainder of this period. The purpose was clear and can be readily grasped from the words of the chairman of the Committee as late as 1970 when the issue of limiting transfers was again raised:

> "Of course the thing that would have everyone deeply concerned would be again a school like the Lewenberg which starts to become evenly balanced or has become so and the white youngsters start to apply under open enrollment to move out, and under this they would be pretty much chained to their seats. They wouldn't be allowed to move."

Further support for segregative intent is gleaned from a staff memorandum dated July 9, 1971 which described open enrollment as "parental choice as to school attendance, historically granted to families in changing neighborhoods." The word of the Committee members and papers confirm the district court's judgment that open enrollment had become "a device for separating the races and contributed significantly to the establishment of a dual school system." 397 F.Supp. at 453.

The "controlled transfer policy", adopted in 1971, supposedly ended open enrollment. The district court, however, found the new policy honeycombed with exceptions—a grandfather clause, a grandfather-plus clause covering those who had merely applied for transfers, a grandfather-plus-plus clause covering younger brothers and sisters of a transferee, transfers within a multi-school district, and an open-ended hardship clause, which amounted to an "escape clause" or "big out", available for racial reasons.

The district court drew the conclusion that "open enrollment and controlled transfer policies were managed . . . with the singular intention to discriminate on the basis of race." 397 F. Supp. at 455. We see no basis for challenging this finding.

D. *Redistricting.*

Districting, the drawing of geographical boundaries for attendance purposes, does not apply to the high schools in Boston. As we have indicated, their student bodies were determined by feeder patterns. Alterations of feeder patterns accomplished the same goals as redistricting or the changing of attendance zones of existing schools. We treat here only actual changes in geographical attendance zones and necessarily confine ourselves to the effect on lower schools.

As indicated above, we now enter an area where decisions were mostly not to do something. There are, even here, some affirmative actions either pro-segregation or in perpetuation of segregation. For example there were districting changes affecting certain fifth and sixth grade classes that were "tracks" to the three examination schools. White students ultimately comprised more than 80 percent of these classes. 379 F. Supp. at 433 n. 16. And redistricting was undertaken where greater integration would not come about, thereby perpetuating existing disparities. In 1959 the boundary lines of the districts for Cleveland and Campbell junior highs were altered for administrative reasons; between 1963-1964 and 1969-1970 Roosevelt junior high in Roxbury and Edison junior high in Brighton were redistricted to house an overflow of students from English high; and in 1969-1970 the Boardman district was changed to accommodate the fourth grade at overcrowded Kennedy. 379 F. Supp. at 437-38. Generally, however, the court was concerned about the focused, knowledgeable resistance to otherwise feasible proposals and opportunities for redistricting.

The district court examined the existing districts in Dorchester for intermediate schools, which are irregularly drawn and do not, in general, coincide with geographical boundaries. As they existed, they maximized racial isolation in the schools while slight changes could have been made which would have been more convenient for students and would also have forwarded integration. 379 F. Supp. at 435. Similarly, elementary schools in the area including that immediately south of South Boston, through Roxbury and into Dorchester, have black districts cut away from predominantly white areas, by an essentially north-south dividing line. The predominantly white schools are located some distance to the east of the dividing line, indicating that the line could, as far as convenience to students is concerned, be readily moved to aid integration. Furthermore, there were several multi-school elementary districts which are segregated according to race within the district with rare exceptions. On no occasion have the city defendants redistricted to eliminate racial imbalance. 379 F. Supp. at 438.[17]

The city's intransigence becomes all too clear when we review the proposals made to it. The Kiernan Report, filed in April, 1965, proposed specific solutions. It was ignored. After the first racial imbalance census taken pursuant to the Racial Imbalance Act, the state Board notified the Com-

[17] Defendants claim that the district court's blanket statement that no redistricting for integrative purposes took place indicates that the court failed to consider evidence that parts of a predominantly white district were added to the John F. Kennedy district for the purpose of improving the racial balance and the Curley Elementary School which was about to open, and that similar redistricting took place upon the opening of the Holland and Ohrenberger schools. We note that the district court did not fail to consider these matters, but included them in its discussions of school openings. When the district court discussed *re*districting, it specifically excluded from its definition the original drawing of districts for new schools. 379 F. Supp. at 437.

mittee that it was under a legal duty to remedy imbalance. The first plan submitted suggested no redistricting and was rejected on that basis. Because of the Committee's failure to comply with state law, state funds were held in escrow during the years from 1966 to 1971—a withholding which must have substantially affected the schools system's ability to meet the educational needs of those years.

The Committee was not left to its own devices. The state Board asked the Joint Center for Urban Studies at Harvard and MIT to submit proposals. Eight alternative redistricting proposals for elementary schools and three for intermediate schools were provided, all being geared to minimize transfers of white students, to avoid long walks for young children, and to avoid the irregular shaping of districts. Safety was a foremost consideration. Kindergarten children were not affected and only junior high students would have had to be bussed under the proposals. Various excuses were given for the dogged refusal to adopt the plans. At one meeting of the Committee in 1966, 379 F. Supp. at 439, the chairman continually urged a good faith effort in order to obtain the release of funds, an effort which he felt would have to include redistricting. To launch such an effort, he moved that the superintendent be directed to review the Joint Center package and "extract from it those recommendations which you can live with and which are workable and will have the effect of" minimizing racial imbalance. This limited, preliminary suggestion was rejected. The Committee proposed instead plans which would permit city blacks to be bused under Metco to suburban schools in exchange for white students from those schools. The plan was rejected by the state Board, submitted again and rejected again. The funds were still withheld. This process continued as the number of racially imbalanced schools increased steadily from 40 in 1966 to 62 in 1969.

The climax was, in the view of the district court, the

Committee's reaction to the Board's rejection of its fourth stage plan in 1971. The Committee countered the rejection by proposals to create an advisory committee to review all district lines, to request technical advice from the Board, and to participate in a committee to oversee development of a "Comprehensive Plan" to eliminate racial imbalance. The Committee, so found the court, appointed strong opponents of balance to the advisory committee, refused access to critical data by the Board, and never appointed members to the committee of oversight. In the district court's words, it "sabotaged" the entire effort. It is beyond dispute that the defendants took every opportunity to maintain segregation where it existed and to foster segregation where it did not. To use the Supreme Court's language, "the 'neighborhood school' concept has not been maintained free of manipulation", *Keyes, supra,* 413 U.S. at 212.

We have addressed the facts found and the district court's inferences drawn as to segregative purpose, and have found no error. Moreover, even if the individual instances were not by themselves capable of supporting a finding of discriminatory intent—and we think those addressed were sufficient—they clearly create a definite pattern of intentional segregatory motives and practices. *United States* v. *Board of School Comm'rs of Indianapolis,* 474 F.2d 81, 84 (7th Cir. 1973), *cert. denied,* 413 U.S. 920 (1973); *Davis* v. *School District of Pontiac,* 443 F.2d 573, 576 (6th Cir. 1971). "[T]he courts are not precluded from drawing the normal inference of intent for consciously consummated acts." 474 F.2d at 85. Here that intent was consistent with expressed motivation. It takes very little alteration of the words of the Supreme Court in describing the Denver school board's actions, found impermissible, to describe accurately the Boston practices:

> "First, it is obvious that a practice of concentrating Negroes in certain schools by structuring attendance

> zones or designating 'feeder' schools on the basis of race has the reciprocal effect of keeping other nearby schools predominantly white. Similarly, the practice of building . . . school[s] . . . in a certain location 'with conscious knowledge that [they] would be . . . segregated' . . . has a substantial reciprocal effect on the racial composition of other nearby schools. So also, the use of mobile classrooms, the drafting of student transfer policies . . . on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition. . . .'' *Keyes*, 413 U.S. at 201-02.

The district court's findings as to school assignment, building policy, the use of mobile classrooms, and districting and redistricting are thoroughly supported. These findings in turn amply support the findings of segregative intent.

IV. Administration of Examination and Trade Schools, and Vocational Programs.

The Boston school system operates three high schools, Boston Latin, Girls Latin and Boston Technical, which serve as college preparatory schools, and which admit students on the basis of competitive examinations. The enrollment at these schools, the district court found, was overwhelmingly white.[18] The city operates two vocational schools, Boston Trade and Girls Trade. These the court found predominantly and increasingly black.[19] There are also a variety of mostly white vocational programs located in regular high schools.

The Supreme Court established in *Keyes* two principles

[18] In 1972 Boston Latin was 2.2% black, Girls Latin was 5.0% black, and Boston Technical was 13.7% black (due in part to an industrial printing program run there which did not admit students on a competitive basis).

[19] The black enrollment at Boston Trade increased from 9.6% in 1967 to 65.2% in 1972. At Girls Trade the increase was from 35.7% to 68.7%.

for use when analyzing school segregation in localities with no history of statutorily based separate education. The first is that

> "[C]ommon sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions. This is not to say, of course, that there can never be a case in which the geographical structure of, or the natural boundaries within, a school district may have the effect of dividing the district into separate, identifiable and unrelated units. Such a determination is essentially a question of fact to be resolved by the trial court in the first instance, but such cases must be rare. *In the absence of such a determination, proof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of the existence of a dual system.* Of course, where that finding is made, as in cases involving statutory dual systems, the school authorities have an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system.' *Brown II, supra,* at 301." 413 U.S. at 203. [Emphasis supplied.]

In short, absent a showing by school authorities that a particular school is geographically isolated, or that the effect of proven deliberately segregative acts was confined to a discrete and discernible portion of the system, every school in a system shown to have been illegally segregated in some respects must be subject to the district court's scrutiny in devising a remedy to eliminate segregation.

The second principle established by the Court in *Keyes* is that, even if there is a determination that part of a district is "separate, identifiable and unrelated":

> "[A] finding of intentionally segregative school

board actions in a meaningful portion of the school system . . . creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions." 413 U.S. at 208.

"[I]t is not enough, of course, that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions. Their burden is to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions." *Id.* at 210.

This presumption, once operative, applies to *any* segregated school, isolated or not, subject to the control of defendant school authorities. They would have the burden of proving the absence of segregative intent.

The district court found no part of the Boston school system to be geographically isolated. Since defendants' policies with regard to new facilities, portable classrooms, overcrowding, districting and redistricting, feeder patterns, open enrollment and controlled transfers, and faculty and staff were all marked by segregative intent, the existence of a dual system was established. The effects of that system, in any school, including the examination and trade schools and the vocational programs, must be eliminated.[20]

[20] The facts with respect to the examination and trade schools and the vocational programs illustrate the logic of the first principle established in *Keyes*. The schools and the programs are integral parts of the educational system in Boston, fulfilling specialized roles in that system. The examination schools are segregated because black children fare worse on the entrance examinations than whites. These children are products of the segregated elementary classes which constituted "tracks" to the examination schools and were more than 80% white.

Even if the evidence of a dual system were not so conclusive, the second principle established by *Keyes* would require, in light of the evidence of intentional segregation elsewhere in the school system, that we presume the segregation in the examination and trade schools and the vocational programs to be intentional. Defendants argue that students were admitted to the examination schools on the basis of an objective standard "having nothing to do" with pupil assignment policies found intentionally segregative elsewhere in the system. Such an "allegedly logical, racially neutral explanation" is not enough. Defendants offer no proof that "segregative intent was not among the factors that motivated their actions".[21] Quite the contrary, there is strong evidence to indicate that the segregation of the examination and trade schools and the vocational programs was intentional.

As we have noted, the vocational programs were over 80 percent white. Students in these programs were recruited primarily at white junior high schools, and the advanced elementary school classes, whose members usually continued to the examination schools. As for the examination schools, defendants were aware at least as early as 1966 that whites were much more successful than blacks on the entrance examinations, yet they made no effort to reconsider the appropriateness of the examina-

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The predominantly white vocational programs recruited primarily at white junior high schools, and have never had any black instructors. Thus, the segregation of the lower schools had inevitable consequences for the examination and trade schools and vocational programs.

[21] As we understand *Keyes*, little short of a positive showing that defendants acted with *integrative* intent would suffice to rebut the presumption of segregative intent. *Berkelman* v. *San Francisco Unified School District*, 501 F.2d 1264 (9th Cir. 1974), cited by defendants, is wholly inapposite, as the court there specifically noted that there was no showing of intentional segregation in the San Francisco School System to warrant the application of *Keyes*. 501 F.2d at 1266 n. 3.

tions, or to take other steps to encourage minority representation until racial discrimination charges were filed with the Massachusetts Commission Against Discrimination. 379 F. Supp. at 467-68.[22]

The predominantly black trade schools, on the other hand, were described by the man later selected to head a proposed unified Boston trade and girls school as "a philosophy that has failed in Boston". Defendants point to the absence of any finding that the vocational programs were better than the trade schools. That one program was not found to be superior to the other, *i.e.*, that it might be "equal" although "separate", does nothing to refute the evidence that blacks were directed toward the trade schools, whites toward the vocational programs. Here again, disparate bits of evidence have but one unifying theme, the intent to maintain a segregated school system.

V. Policies and Practices Affecting Faculty and Staff.

The district court found the Boston school system segregated as to faculty, and staff, as well as to students. Although we deal with it last, we do not view it as the least significant aspect of the district court's opinion. Such segregation ". . . is among the most important indicia of a segregated system". *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971). Segregative policies with respect to faculty and staff violate the Constitution independently of the segregation of pupils. *Rogers* v. *Paul*, 382 U.S. 198, 200 (1965); *Bradley* v. *School Bd. of City of Richmond*, 382 U.S. 103 (1965); *Green* v. *County School Bd.*, 391 U.S. 430 (1968); *United States* v. *Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ., supra.*

[22] The settlement of these charges led to the use in 1973 of examinations prepared by Educational Testing Services, in Princeton, N.J., and the reservation of a number of seats in the examination schools for underrepresented districts of the city. This action has no relevance to defendants' intent in earlier years. *Keyes*, 413 U.S. at 210.

The district court found that most of the black teachers in the Boston school system were teaching in schools whose student population was over 50 percent black. In 1972-1973 68 percent of the black teachers were concentrated in the 59 schools (29 percent of the total) which were majority-black. 379 F. Supp. at 459. Further, 81 schools (40.3 percent) had never had a black teacher, and 35 others (17.4 percent) had had only one black teacher in any year since 1967-1968 (the earliest year for which figures were put in evidence). All 19 black administrators were assigned to nine majority-black schools during 1972-1973, and the five black principals were assigned to schools ranging from 66 percent to 97 percent black. While no school had a faculty which was more than 50 percent black, that fact is hardly significant in light of the fact that blacks constituted only 5.4 percent of the permanent teaching staff.[23]

The district court attributed the allocation of black teachers to black schools to three factors: defendants' policy of honoring requests by principals and headmasters

[23] Defendants argue that when the Supreme Court said in *Swann* "... where it is possible to identify a 'white school' or a 'negro school' simply by reference to the racial composition of teachers and staff ... a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown," 402 U.S. at 18, it referred only to school systems in which some faculties were majority-black. We think defendants misread *Swann*. If the Court had intended to establish a mathematical rule it could have done so explicitly. The passage quoted calls for us to determine what the numbers mean in the context of the case before us. Such an approach is entirely consistent with that established by the Court in *Keyes* for the analogous determination whether a student body is segregated, 413 U.S. at 196.

Even if we accepted defendants' reading of the *Swann* language, it would be of little avail, for *Swann* simply states one basis on which a constitutional violation may be found. It is silent as to the impact of findings such as the district court has made in this case, that the concentration of most of the system's black teachers in the small minority of schools which are dominantly black has resulted from segregatory policies knowingly pursued by defendants.

for assignment of black teachers to their schools; defendants' transfer policy which allocated vacant positions in order of seniority; and the high proportion of provisional teachers among the black faculty in the school system.[24] The three factors are interrelated. When a position becomes vacant at a school, it is given to the most senior teacher wishing to transfer to it. If not filled by a transfer, the vacant position is offered to a certified teacher on the eligible list of applicants who have completed the screening process. If no certified teacher fills the vacancy, a noncertified provisional is hired. Thus, the most desirable teaching positions have been occupied by the most senior teachers, the least desirable by the less senior teachers, the provisionals getting the residue. Positions in identifiably black schools have been regarded as less desirable. Thirty-nine transfer requests were granted in 1971 and 1972 for teachers wishing to leave majority black schools to go to majority white schools. None went the other way. Since only about one percent of teachers in the school system in the early 1960's were black, and many of the black teachers were provisionals, a very small number of black teachers were in a position to transfer to those teaching positions deemed most desirable. Although the Superintendent had the power to make or deny transfers for the good of the school system, and could have utilized this power to balance the distribution of black teachers, the district court found that he had not done so. The personnel department did, however, seek to honor the

[24] About 15% of the total teaching staff in the school system were provisionals. Thirty-five of the black teachers were provisionals. Provisionals are hired under an exception to the requirement that teachers in Massachusetts have teaching certificates. They need not have taken the National Teachers Examination, nor have achieved a good score if they have taken it. They are hired under one year contracts at lower pay than permanent teachers, receive tenure only if hired for three consecutive years, and have no rights of transfer or promotion. 379 F. Supp. at 457, 460.

requests of school principals and headmasters that black teachers be assigned to their districts, a policy which had a segregative effect.

Defendants contend that black teachers' commitment to the education of black children, and the need of black children for black adult role models justified the concentration of black teachers in majority-black schools. As to the first contention the district court, after first noting the absence of evidence of any special interest on the part of blacks for such assignments, observed that the constitutional ban on segregation could not in any event yield to the desires of black teachers or parents. As to the second contention, the court found no systematic inquiry or empirical data to support it, and no evidence that this concept played any part in matching the races of teacher and pupils. Our own review of the record entirely supports the district court.

The result of defendants' *practices* was not only to concentrate most black teachers in black schools, but also to place in those schools a lower proportion of experienced teachers and a higher proportion of provisionals. We do not understand defendants to dispute these findings.

The district court also found that defendants discriminated with respect to hiring and promotion. In 1970-1971, 3.5 percent of the professional staff in the Boston school system was black. As we noted at the beginning of this section of the opinion, in 1972-1973 all of the black administrators in the school system were assigned to predominantly black schools. Promotions to administrative positions were granted on the basis of a "rating" system which gave up to 600 points for credentials and up to 200 points on the basis of a personal interview. 760 points were necessary for a candidate to be "rated". Two prerequisites were a score of at least 70 percent on an essay examination administered by the board of examiners, and four to

six years employment in a permanent position in the school system. Lists of candidates "rated" for a particular position were compiled every three years, effective for three years. The effect of the requirement of four to six years' experience in a permanent position, and of the three year duration of the "rated" lists was to imbed in the administrative staff previous discrimination in the hiring of black teachers.[25] The district court concluded that, at least by 1970, defendants were aware of this fact.[26]

Until 1968 candidates for permanent teaching positions in the Boston school system were required to score 70 percent or better on the Boston Teachers Examination. Between 1968 and 1970, candidates were permitted to use either a Boston Teachers Examination score, or an equivalent score (560) on the National Teacher Examinations (NTE) prepared by the Educational Testing Service (ETS). After 1970 all candidates were required to take the NTE.[27] Those candidates achieving the requisite score were then ranked according to a composite score which factored in the results of an interview, the candidate's credentials and the test score. This composite score, the district court found, almost always corresponded to the test score, the interview and the candidate's credentials

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[25] Defendants argue that the evidence does not show that the "rating" system itself was segregative. We agree. We do not know the number of blacks or of whites who sought to be "rated", nor the success rate for either group. We do not know what percentage of "rated" blacks, as opposed to "rated" whites actually received promotions. We do know that the black 3.5% of the administrative staff in the school system must, as a consequence of the 4-6 year experience requirement and the three year life of the "rated" lists, have come from among teachers who were employed in the early sixties, a time when less than 3.5% of the teachers were black.

[26] The "rating" system was suspended in 1971. The district court found that the thirty acting appointments made from 1971 until the time of the trial had all been filled by whites.

[27] In 1972 the required score was reduced to 400, and in 1973, to 320.

having no practical effect on the candidate's ranking. Defendants were aware that blacks tended to score lower than whites on the NTE, that exclusive reliance on NTE scores for hiring purposes either through the use of a "cutoff" score, or by ranking according to scores was discouraged by ETS and had the effect of discriminating against blacks, and that the NTE has never been shown to have substantial predictive validity (high test scores do not indicate ability to teach). 379 F. Supp. at 464.[28]

In *Castro* v. *Beecher*, 459 F.2d 725, 732 (1st Cir. 1972), we held that

> "[t]he public employer must . . . in order to justify the use of a means of selection shown to have a racially disproportionate impact, demonstrate that the means is in fact substantially related to job performance. It may not, to state the matter another way, rely on any reasonable version of the facts, but must come forward with convincing facts establishing a fit between the qualification and the job."

The district court was fully supported by the evidence in concluding that defendants' use of the NTE had a racially disproportionate impact, and that no showing was made that the NTE was "substantially related to job performance". *Walston* v. *County School Board of Nansemond County, Va.*, 492 F.2d 919 (4th Cir. 1974); *Baker* v. *Columbus Municipal Separate School Dist.*, 329 F. Supp. 706, 714-15 (N.D. Miss. 1971); *see also Boston Chapter, N.A.A.C.P.* v. *Beecher*, —— F.2d —— (1st Cir. 1974).

Quite apart from its independent significance, defen-

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[28] Defendants argue that if the NTE is somewhat related to teaching competence, its use as a part of the hiring process is legitimate. The district court found, however, that the NTE was in practice the only hiring criterion, and that the use of the "cutoff" score of 560 was inherently discriminatory. *See Walston* v. *County School Bd. of Nansemond County, Va.*, 492 F.2d 919 (4th Cir. 1974), where the Fourth Circuit, in an opinion by retired Justice Clark, ruled unconstitutionally discriminatory an NTE "cutoff" score of 500.

dants use of the NTE adds another strand to the fabric which binds the elements of this case together. The discriminatory hiring practices, segregative assignment and transfer policies, and the promotion system which perpetuated in administrative positions the effects of discriminatory hiring, have further combined to buttress the segregated nature of the school system. Their cumulative effect was to isolate black students, black teachers and black administrators in a limited number of schools, thereby denying to those students the equal educational opportunity to which they are constitutionally entitled. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ., supra; United States* v. *Montgomery County Bd. of Educ., supra.* Faculty segregation, which is uniquely amenable to the control of school authorities, *Kelly* v. *Guinn*, 456 F.2d 100, 107 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973), is a significant element in a racially discriminatory system which must be ". . . eliminated root and branch". *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430, 438 (1968).

Moreover, as the district court properly found, the result of defendant's policies as to transfer, assignment, and placement of provisional teachers was to allocate to the schools attended by most black children the least experienced and least credentialed teachers, and to cause a rate of faculty turnover at predominantly black schools far higher than that at white schools. We affirm the district court's conclusion that these policies operated to deny to plaintiffs the equal education to which they are entitled.[29]

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[29] Plaintiffs suggest that the denial of equal education would constitute a violation of the Equal Protection Clause independently of any finding of racial segregation. We do not reach that question. The evidence of racial segregation in the Boston schools is too massive to suggest that we pursue alternative theories. Equal educational opportunity has been the central theme of all of the generations of school desegregation cases beginning with *Brown*.

CONCLUSION

Having considered all arguments given to us in the briefs and at oral argument, and having read the materials submitted to us by the parties, we are of the opinion that the district court gave the most deliberate and sensitive attention to this traumatic issue. More pertinently, in the light of the ample factual record and the precedents of the Supreme Court, we do not see how the court could have arrived at any other conclusion. We cannot fail to be aware of the unrest that attends any moment when change in old approaches is at last mandated by court decree. But while Boston is unique in some of its traditions, demographic profile, and style, its uniqueness cannot exempt it from complying with a national policy forged long ago and laboriously implemented throughout the land. The poet, Robert Lowell, wrote of the Beacon Hill statue commemorating the young white Colonel Shaw and our first black regiment, commissioned in 1863, "Their monument sticks like a fish bone in the city's throat."[30]

This is not the first time that a city has been riven with controversy over the implications of ending segregation in public schools. Mr. Justice Frankfurter, concurring in *Cooper* v. *Aaron,* 358 U.S. 1, 25 (1958), wrote words that are as pertinent today as they were sixteen years ago:

> "Deep emotions have . . . been stirred. They will not be calmed by letting violence loose . . . submitting to it under whatever guise employed. Only the constructive use of time will achieve what an advanced civilization demands and the Constitution confirms."

And the constructive use of time necessarily depends upon "the fruitful exercise of the responsibility of those charged with political official power." *Id.*

The judgment of the District Court is affirmed.

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[30] Robert Lowell, *For the Union Dead.*

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 74-1251

TALLULAH MORGAN ET AL.,
PLAINTIFFS, APPELLEES,
v.
JOHN J. KERRIGAN ET AL.,
DEFENDANTS, APPELLANTS.

JUDGMENT
Entered December 19, 1974

This cause came on to be heard on appeal from the United States District Court for the District of Massachsetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

Enter: COFFIN, *Ch. J.*

By the Court:
(s) DANA H. GALLUP
Clerk

[cc. Messrs. Mirick, Flannery, Mayo and McMahon]

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TALLULAH MORGAN ET AL.,
PLAINTIFFS,
v.
JAMES W. HENNIGAN ET AL.,
DEFENDANTS.

Civil Action No. 72-911-G

OPINION

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-911-G
TALLULAH MORGAN ET AL.,
PLAINTIFFS,
v.
JAMES W. HENNIGAN ET AL.,
DEFENDANTS.

OPINION
June 21, 1974

GARRITY, J. This is a school desegregation case brought by black parents and their children who attend the Boston public schools. Plaintiffs seek for themselves and on behalf of their class[1] declaratory and injunctive relief against the defendants for a myriad of acts that allegedly violate the constitutional rights of the plaintiff class. Defendants are the Boston School Committee, its individual members, and the Superintendent of the Boston Public Schools (hereinafter collectively "the city defendants"), and the Board of Education of the Commonwealth of Massachusetts, its individual members, and the Commis-

[1] The court certified the named plaintiffs as proper representatives of a class of "all black children enrolled in the Boston Public School System and their parents." Thereafter *Keyes* v. *School Dist. No. 1*, 1973, 413 U.S. 18, 195-198, held that "petitioners are entitled to have schools with a combined predominance of Negroes and Hispanos included in the category of 'segregated' schools. At the trial, the parties did not frame any issues as to discrimination against non-black minority students, who comprise approximately 7% of Boston's public school population; and in this opinion the term "racial segregation" when unqualified will refer to blacks only. However, at future hearings concerning equitable remedies required to convert the Boston schools from a dual to a unitary system, the *Keyes* holding will of course be observed and consideration given to the treatment of non-whites other than blacks.

sioner of Education (hereinafter collectively "the stat
defendants").

Plaintiffs have alleged that the city defendants hav
intentionally brought about and maintained racial segre
gation in the Boston public schools by various actions
including the adoption and maintenance of pupil assign-
ment policies, the establishment and manipulation of at-
tendance areas and district lines reflecting segregated re-
sidential patterns, the establishment of grade structures
and feeder patterns, the administration of school capacity,
enlargement, and construction policies, transportation
practices, and by unjustifiably failing to adopt or imple-
ment policies reasonably available to eliminate racial se-
gregation in the Boston public schools. Plaintiffs assert
that these alleged practices have resulted in denying black
school children the equal protection of the laws, in viola-
tion of the Fourteenth Amendment to the United States
Constitution. See *Brown* v. *Board of Education*, 1954, 347
U.S. 483; *Keyes* v. *School Dist. No. 1*, 1973, 413 U.S. 189.
Plaintiffs further contend that the city defendants and
their predecessors have engaged in racial discrimination
with respect to the hiring and assignment of faculty and
staff, and with respect to curricula and the allocation of
instructional materials, and resources; that both the city
and state defendants have implemented pupil classifica-
tion practices which discriminate against some children
in admission to certain schools, and have maintained a
pattern of lower instructional expenditures in schools at-
tended disproportionately by black children. Plaintiffs
argue that these practices deny black children their con-
stitutional right to equality of educational opportunity
under the Fourteenth Amendment. Federal jurisdiction is
invoked and exists under 28 U.S.C. § 1343, and violations
of the Thirteenth and Fourteenth Amendments and 42
U.S.C. §§ 1981, 1983 and 2000d are alleged.

The city defendants have generally denied the allegations of the plaintiffs. They have also argued that to the extent that schools in the Boston system contain disproportionate numbers of whites or blacks, that result is due to residential segregation over which they have no control and also due to the neighborhood school policy, which defendants claim is a constitutionally permissible tool of educational policy. The city defendants further assert that not only have they not promoted segregation but they have tried to effect a better racial balance in the Boston public schools in accordance with the Racial Imbalance Act, Mass. G.L. c. 71, §§ 37 C and D, and they allege that they have been found to be in compliance with that Act. Along this same line of defense, the city defendants assert that they can do no more consistently with the Racial Imbalance Act than they have already done to eliminate racial imbalance in the city's public schools.

The state defendants have also denied any constitutional wrongdoing. They contend that they have frequently made unheeded suggestions to the city defendants on how to alleviate racial imbalance in Boston; that they have only limited control over the activities of the city defendants; and that by enforcing the Racial Imbalance Act and by pursuing judicial enforcement of the Act when the board of education's orders were not complied with by the Boston School Committee they have done as much as possible to eliminate racial segregation in the Boston public schools. The state defendants have agreed with virtually all the contentions made by the plaintiffs here against the city defendants.

Various pretrial rulings should be mentioned. Shortly after the action was commenced, the members and officers of the Boston Teachers Union sought to intervene as parties defendant. Partly because the positions of the city defendants and the teachers were identical on constitu-

tional issues involved in this case, the court denied the motion without prejudice to renewal should the alleged constitutional violations be found. The court denied a motion of the city defendants to join numerous cities and towns around Boston as defendants, partly on the ground that the proposed defendant cities and towns had not been charged by the plaintiffs with contributing to the violation of their constitutional rights.[2] The court also denied a motion to dismiss the complaint by the city defendants, and their motion to stay the proceedings pending implementation of an order entered against the city defendants in a state court case between it and the state defendants involving the Massachusetts Racial Imbalance Act, Mass. G.L. c. 71, §§ 37C, 37D. *School Committee of Boston* v. *Board of Education*, 1973 Mass. Adv. Sh. 161. The court granted a motion to dismiss a cross-claim of the state defendants charging the city defendants with actions substantially set forth in plaintiffs' own complaint.

At the court's request, the parties have attempted, insofar as possible, to enter into stipulations of undisputed facts and to introduce evidence by way of designations and counter-designations of depositions and prior testimony of witnesses in the state case referred to above and in a proceeding between the city and the federal Department of Health, Education & Welfare. Counsel's pretrial activities helped to shorten the actual trial of this case, which lasted fifteen days, and which concerned only the

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[2] The ordering of busing across governmental boundary lines—the transportation of students between the suburbs and the city—remains of challengeable validity. The Supreme Court's first encounter with the issue resulted in a four-to-four affirmance of a Court of Appeal's reversal of such a remedial order. See *Bradley* v. *Virginia State Board of Education*, E.D. Va. 1972, 338 F.Supp. 67, *rev'd* 4 Cir. 1972, 462 F.2d 1058, *aff'd* 412 U.S. 92 (1973) (*per curiam*). The issue is now again before the Supreme Court. *Milliken* v. *Bradley*, 6 Cir. 1973, 484 F.2d 215, *cert. granted*, 42 U.S.L.W. 3306 (U.S., Nov. 20, 1973). The case was argued before the Court on February 26, 1974, 42 U.S.L.W. 3500.

liability issues of the case, as contrasted with issues relating to the possible remedy. The court also had a one-half day view of some of the Boston schools and received several hundred exhibits.

The case was reopened on June 20, 1973 to receive evidence regarding the use of a new high school facility. The plaintiffs alleged that the city defendants in their conduct with respect to this new structure were engaged in further racial discrimination in violation of the Equal Protection Clause. The court received further evidence from both parties. On March 15, 1974 the city defendants moved to reopen the case to submit evidence dealing with their ongoing litigation in the state courts with the State Board of Education and the plan they had been ordered to implement under the Racial Imbalance Act. This motion was denied.

Massachusetts Racial Imbalance Act

Questions of racial segregation in the public schools of Massachusetts have a unique dimension because of a state racial imbalance law, Mass. G.L. c. 71, §§ 37C and 37D and c. 15, §§ 1 I, J and K, passed by the legislature in 1965. It has been said that the requirements of the state statute go further than those of the Fourteenth Amendment, see *School Committee of Springfield* v. *Board of Education*, 1974 Mass. Adv. Sh. ——, (slip op. at 28) (May 1, 1974 — Springfield II), in the sense that the statute commands affirmative action to eliminate racial imbalance in public school systems whatever its cause, i.e., independently of a finding of *de jure* segregation. The statute has been construed and applied in several decisions of the Supreme Judicial Court of the Commonwealth pertaining to public schools in Boston and Springfield. See, as to the latter, *School Committee of Springfield* v. *Board of Education*, 1973 Mass Adv. Sh. 1543, and *Springfield II, supra.* Although the statute is not directly involved in the instant

proceedings, it is highly relevant. Many of the defendants' actions were taken as result of the state law. The provisions of the statute were the subject of frequent discussion at meetings of the Boston School Committee. Efforts by the city defendants to evade the statute illumine their intent with respect to school segregation generally. Communications between the city and state defendants were usually in the context of provisions of the statute.

The Racial Imbalance Act evolved from a report in April 1965 by an advisory committee appointed by the State Board of Education and the Commissioner of Education to study racial segregation in the public schools of Massachusetts generally and of Boston, Springfield, Cambridge, Medford and Worcester individually, named the Kiernan Report after the then Commissioner of Education for the Commonwealth, Dr. Owen B. Kiernan. The report concluded that racial imbalance was educationally harmful and should be eliminated. The report specifically noted that Boston contained 45 "imbalanced" schools — i.e., schools with more than 50% non-white students, and proposed various methods whereby the city might solve the problem. The response of the Boston School Committee was first, on April 26, 1965, to refuse to acknowledge that racial imbalance was a problem that ought to be eliminated and then in June to adopt a report by Superintendent Ohrenberger which disputed the premise that racial imbalance was educationally harmful but suggested that "interracial learning experiences are socially desirable." As a result of the Kiernan Report, the Massachusetts legislature passed the Racial Imbalance Act of 1965.[3] The statute declares that the promotion of racial balance in

[3] The Act was unsuccessfully attacked as unconstitutional by the Boston School Committee in 1966, *School Committee of Boston* v. *Board of Education*, 1967, 352 Mass. 693, in which the Supreme Judicial Court stated, at 698, "The committee seems bent on stifling the act before it has a fair chance to become fully operative."

public schools is the policy of the Commonwealth and provides that "[t]he prevention or elimination of racial imbalance shall be an objective in all decisions involving the drawing or altering of school attendance lines and the selection of new school sites." Mass. G.L. c. 71, § 37C. Under the Act, the school committees in Massachusetts cities and towns must each year file racial statistics with the State Board of Education. If the state board finds "racial imbalance", which exists when "the percent of non-white students in any public school is in excess of fifty percent of the total number of students in such school", it notifies the school committee of that fact. The committee must then file a plan for the elimination of such racial imbalance. Plans for eliminating imbalance may involve redistricting, new school construction, additions to schools and "other methods." Under the statute only safety may be considered equally with the alleviation of racial imbalance. Regarding the sensitive question of busing, the Act provides,

> "No school committee or regional school district committee shall be required as part of its plan to transport any pupil to any school outside its jurisdiction or to any school outside the school district established for his neighborhood, if the parent or guardian of such pupil files written objection thereto with such school committee."

The statute does not mention racial imbalance of faculty and administrative staff.

Under the Act it is the responsibility of the state board to provide assistance in the formulation of plans; to make recommendations if no plan is filed, or if a plan is filed but does not meet statutory requirements; and to withhold state financial aid if the school committee "does not show progress within a reasonable time in eliminating racial imbalance in its schools . . . ." Mass. G.L. c. 15, § 1I.

With respect to state financial assistance, the usual state contribution in Massachusetts to the cost of schoolhouse construction or enlargement is 40%; the Act provides, in § 1I, for an increase to 65% when construction is for the purpose of reducing or eliminating racial imbalance in the school system.

State Court Litigation

State courts have made several rulings whether the Boston school committee has complied with the Racial Imbalance Act and whether the state board might lawfully withhold state aid from the City of Boston. More often than not their rulings have turned on procedural aspects of the Racial Imbalance Act. Nevertheless a general familiarity with the state court litigation is essential to a full understanding of the Boston situation. The first suit by the committee was the attack upon the constitutionality of the Racial Imbalance Act in 1967, noted *ante* at n. 3. In a subsequent case brought by the committee in the Suffolk County Superior Court, the withholding of state funds by the board under the Act was challenged. The controversy centered around what was known as the city's Fourth Stage Racial Imbalance Plan.[4] On December 18, 1972 the Superior Court ruled, in a complex opinion, that the board could not withhold the state monies because the committee was in literal compliance with the Act, noting, however, that compliance was minimal. On appeal the Massachusetts Supreme Judicial Court affirmed the Superior Court decision on the ground that the board's action had been predicated upon a single committee vote on September 21, 1971[5] rather than upon all of the cir-

[4] The history of the dealings between the state board and the committee involving this plan and earlier ones is set out substantially accurately in the state defendants' requested findings of fact numbered 1-118. Because it is not necessary to our decision, we shall not recount the details.

[5] The committee had in effect reversed its own plan to open the Lee school racially balanced. The circumstances surrounding that situation are set forth more fully, *infra*.

cumstances of imbalance within Boston. *School Committee of Boston* v. *Board of Education*, 1973 Mass. Adv. Sh. 160 (February 2, 1973). On February 15, 1973 the Supreme Judicial Court reviewed a determination of invalidity of a board plan which arose out of the same Superior Court proceedings. The court ruled that judicial review of the board's plan should be upon the basis of an administrative record and ordered the trial judge to vacate his order and interlocutory decree and to remand the proceedings to the board for the development of a record. Professor Jaffe of Harvard Law School, as a hearing examiner for the board, conducted hearings and filed a detailed report on May 29, 1973, including findings and recommendations which were substantially adopted by the board on June 25, 1973.

On June 28, 1973 Governor Sargent requested an advisory opinion from the Supreme Judicial Court on the constitutionality of a bill passed by the legislature and awaiting his approval which would prohibit the transportation of students without the written consent of their parents. In *Opinion of the Justices*, 1973 Mass. Adv. Sh. —— (July 10, 1973), the court ruled that the bill would be unconstitutional and the Governor vetoed it.

On July 16, 1973 the Supreme Judicial Court reviewed three suits involving the use of a new $24,000,000, ten-story building on Avenue Louis Pasteur, due to open in September 1973. This tower facility was constructed as part of a plan to alleviate racial imbalance in high schools and accordingly qualified for increased state financial assistance, 65% of the cost instead of the usual 40%. It was originally planned for occupancy by English High School, but on April 23, 1973 the committee voted to use it for Girls Latin School.[6] The court enjoined the committee from turning the facility over to Girls Latin.

[6] The facts surrounding this episode are set out more fully, infra.

The committee's next case challenged the board's plan for racial balance which had grown out of the Jaffe hearings. Noting the committee's complete inaction since those hearings, the court rejected the challenge, putting the committee on notice that the time for testing the statute had passed, and it was time for implementation. *School Committee of Boston* v. *Board of Education,* 1973 Mass. Adv. Sh. 1315 (Oct. 29, 1973).

On November 14, 1973 a single justice of the Supreme Judicial Court ordered the committee to file with the board a detailed plan for implementation of the board's order. On December 11, 1973 the committee filed two documents with the board, which on December 26, 1973 disapproved of portions of both and ordered that specific steps be taken to insure implementation in September of 1974. On January 4, 1974 the board filed a petition seeking judicial enforcement of its orders. On January 9, 1974 the committee represented to the single justice that it would comply and the justice accordingly adjourned the hearing until January 16, 1974, the day after the deadline for compliance. The justice on that date determined that the committee had not complied with the board's order and ordered compliance by January 21, 1974. *Board of Education* v. *School Committee of Boston* (January 16, 1974).

On March 16, 1974 the board again petitioned the Supreme Judicial Court for further enforcement of its orders on the basis of the committee's responses subsequent to the January 16, 1974 order entered by a single justice of the court. The court again found that the committee had not complied with the board's orders and that it had not complied fully with the court's order, and stated that several of the committee's submissions manifested a continued attempt to delay implementation of the racial balance plan. *Board of Education* v. *School Committee of Boston,* 1974 Mass. Adv. Sh. —— (Mar. 22, 1974).

On April 17, 1974 a single justice of the court entered a further order that the committee comply with other detailed board orders. With respect to the plan for balancing Boston's schools in September of 1974, the order specifically required that staff assignments be completed by May 1, 1974, that the staff be officially notified of those assignments by May 15, 1974, and that the safety and transportation plan for students be completed, adopted by the committee, and submitted to the board by May 15, 1974.[7]

At several times during the course of the proceedings in this court, the city defendants have advanced the theory that the committee has been found to be in literal compliance with the Racial Imbalance Act by the state courts; that there are restrictions in the Act and in interpretive decisions limiting the measures which school committees may take in alleviating imbalance; and that consequently, since the committee has done all that it could under the Act, the state law itself and the state defendants are responsible for racial segregation in Boston.

This theory of the city defendants must be rejected on several grounds: (1) Boston is only now on the threshhold of real compliance with the 1965 statute as a result of numerous board orders and a series of unfavorable court decisions. (2) The record in this case simply will not support a finding that the city defendants saw themselves caught on the horns of the legal dilemma of choosing between fidelity to state law or to federal constitutional principles, and in good faith chose to follow state law. (3) Even if they had done so, assuming a conflict, their choice would not have been constitutional. (4) The premise

[7] Recent political developments, however, may nullify the plan formulated under orders of the Supreme Judicial Court and steps taken by the city defendants to carry it out. On April 29, 1974 the Massachusetts legislature passed a bill repealing the Racial Imbalance Act. On May 10, the Governor vetoed the bill but proposed amendments to the Act which would enervate it.

underlying the city defendants' theory, viz., that the Racial Imbalance Act and the Constitution of the United States are in conflict, is plainly specious. As to the facial validity of the Act, we subscribe both to the Supreme Judicial Court's conclusion of constitutionality and its observation,

> "It would be the height of irony if the racial imbalance act, enacted as it was with the laudable purpose of achieving equal educational opportunities, should, by prescribing school pupil allocations based on race, founder on unsuspected shoals in the Fourteenth Amendment." *School Committee of Boston* v. *Board of Education*, 1967, supra at 698.

As to any constitutional attack on the Act as applied, Boston's present racial segregation is hardly the result of the city defendants' having complied with the state statute. Indeed it is just the opposite.

Federal Administrative Proceedings

The city defendants have also encountered administrative sanction by the federal government for alleged violations of the Civil Rights Act of 1964; alleged discrimination on the basis of race. At issue in federal administrative proceedings are many millions of dollars in federal funds in a wide variety of educational aid programs.[8]

Elementary and Secondary Education Act (ESEA),
Title I, 20 U.S.C. §§ 241a-244
1971 — $6,105,501
1972 — $8,817,298
1973 — $5,928,429
Federal Assistance for Education of Handicapped
Children under P.L. 89-313, Amendment to Title I, ESEA
1972 — $24,000
1973 — $21,000

[8] Some of these federal programs have recently been reduced or eliminated, but the funds withheld may still be obtained if Boston is found to be in compliance with a final desegregation order. 42 U.S.C. § 2000(d)-5.

School Library Resources, ESEA, 20 U.S.C. §§ 821-827
1971 — $124,997
1972 — $145,371
1973 — $145,371
Supplementary Educational Centers and Services
ESEA Title III, 20 U.S.C. §§ 841-848
1971 — $576,984
1973 — $559,494
Education of Handicapped Children, Title VI,
ESEA, 20 U.S.C. §§ 871-880
1971 — $41,231
1972 — $33,645
1973 — $89,345
Strengthening Instruction in Critical Subjects,
Title III NDEA, 20 U.S.C. §§ 441-444
1971 — $105,029
1972 — $100,914
Vocational Education, Vocation Education Act of 1963,
20 U.S.C. §§ 1241-1355, 1391
1971 — $228,080
1972 — $176,046
1973 — $455,836
School Assistance in Federally Affected Areas,
20 U.S.C. §§ 236, 240
1971 — $611,072
1972 — $643,976
1973 — $600,000
Education Professions Development Act, 20 U.S.C.
§ 1091, P.L. 90-35, B2
1972 — $100,000
1973 — $120,000
Grants to Strengthen State Departments of Education,
Title V, ESEA, 20 U.S.C. § 862
Children of Migratory Workers, 20 U.S.C.
§§ 241c(a)(b), 241e(c)
Guidance, Counseling and Testing, Title V-A, NDEA,
20 U.S.C. §§ 481-485
School Construction in Federally-Affected Areas,
P.L. 81-815, 20 U.S.C. §§ 641-645
Teacher Corps,
20 U.S.C. §§ 1101-1107a
Drop-Out Prevention,
20 U.S.C. § 887
Economic Opportunity Act of 1964, Title II, Community
Action Programs—Special Programs and Assistance:
Head Start and Follow-Through, 42 U.S.C. § 2809
Area Redevelopment Act, Section 241,
42 U.S.C. § 2610a

Emergency School Assistance Program,
45 C.F.R. 181
Strengthening Instruction in the Humanities,
20 U.S.C. §§ 951, 952, 961
Cooperative College—School Science Program,
20 U.S.C. § 1861

By letters dated November 30, 1971 and June 2, 1972 the Office of Civil Rights of the Department of Health, Education and Welfare (HEW), pursuant to 42 U.S.C. § 2000d-1, attempted unsuccessfully to secure voluntary compliance with the federal Act. On June 2, 1972 consolidated compliance proceedings were begun with HEW, the National Science Foundation, and the Department of Housing and Urban Development (HUD) participating. Since then federal funds in the above-listed amounts, and more, have been withheld from the public schools of Boston pursuant to 42 U.S.C. § 2000d-1. After notice and extensive pre-hearing proceedings, the hearing began on September 19, 1972 and continued until October 5, 1972. Following the filing of briefs and oral arguments, Administrative Law Judge Ring made his initial decision finding the city defendants in violation of the federal statute. *In the Matter of Boston Public Schools,* March 2, 1973. Judge Ring's decision was affirmed, with minor exceptions, by the final reviewing authority in HEW, *In the Matter of Boston Public Schools.* April 19, 1974, which found, with HUD's concurrence, that the city defendants have been guilty of *de jure* segregation.

The federal officials determined that Boston had, by persistent continuing segregation practices, intentionally created a dual school system. Included in these practices were the creation of the middle school system with feeder patterns into and out of those schools and the complementary attendance options of open enrollment and later controlled transfers with assorted exceptions. The city defendants' practices with respect to the McCormack,

Thompson, Michelangelo, Lee and other schools were found to have purposefully created segregated schools.[9]

The Boston School District in General

The Boston school system, whose boundaries are coterminous with those of the city, is headed by a five-member school committee elected at large by the voters of Boston. There is also a board of superintendents consisting of the superintendent, who is the chief school administrator, deputy superintendent, associate superintendents and the business manager. Each member of the board, which advises the superintendent, is in charge of a department. These departments include school operations, educational planning in which there is an educational planning center, personnel, staff training and development, special services, curriculum and inspection, and the business department. Each assistant superintendent is in charge of a portion of Boston known as a district. A district contains all levels of schools.

The school system is funded through a complicated statutory formula, applicable only to Boston, which allows the school committee to appropriate the great bulk of the system's funding but requires the Boston city council to appropriate another portion upon the request of the school committee and the recommendation of the Mayor. The committee also lacks autonomy in selecting sites and contracting for the construction of new schools, as to which final responsibility lies with the Public Facilities Commission, an independent agency of the city.

The Commonwealth of Massachusetts traditionally has exercised little authority over the day-to-day operation of local school districts. The role of the state department of education, which is under the supervision of the state

[9] While the HEW proceedings have parallelled this case, our findings are independent of the findings of the federal administrative agencies.

board of education, with respect to local school systems is largely supportive — providing a communication and information center, specialized services and planning. The chief administrator for elementary and secondary education within the department is the commissioner of education. The primary authority of the department is in the promulgation of educational standards: minimum school day lengths, minimum number of days in a school year, professional standards, maximum pupil-teacher ratios, ages for school attendance, nutritional standards, minimum educational standards, minimum building standards, etc. The department has two other important responsibilities, the distribution of federal and state aid, see Mass. G.L. c. 15, § 16, and the supervision of the Racial Imbalance Act, *id.* at § 1I. One other provision should be specifically noted.

> "The board shall see to it that all school committees comply with all laws relating to the operation of the public schools and in the event of noncompliance the commissioner of education shall refer all such cases to the attorney general of the commonwealth for appropriate action to obtain compliance." *Id.* at § 16.

While this division of authority between the state department of education and local school committees may be traditional, preferred, and most politically feasible, it is not required. The state has the authority, if the legislature should so enact, to take education out of the hands of local officials completely. Thus local officials derive all of their authority from the state ultimately.

Boston, one of the oldest cities in the country, retains much of its colonial layout, particularly in the downtown area. Bays and rivers and the street layout of the city have to some degree isolated some sections. The Charlestown and East Boston areas, surrounded by the Atlantic ocean and the Charles and Mystic rivers, are north of the

center and have limited access to Boston proper. The South Boston area has less of a restriction on access, but remains a distinct section of the city. As in other places, political boundaries have also isolated one segment of the city. Thus, the Brighton-Allston area to the west, while easily accessible, is cut off politically from the rest of the city by the Town of Brookline except for a narrow connecting strip of Boston along the south bank of the Charles River.

The Boston school system was at one time a system of districts, subdivisions of the city, which funneled students from elementary schools through district junior high schools to district high schools. Boston has also had citywide schools for many years. These originally fell into two categories, special examination schools and citywide trade schools. The special examination schools were Boston Latin and Girls Latin for college preparatory work, and Boston Technical for technical and trade work. The citywide trade schools were Boston Trade and Girls Trade, with no examination required for admission. In addition to these trade schools special programs such as auto mechanics, upholstery and electricity were offered at the various district high schools and open to students throughout the city. From this basic organization the Boston school system has evolved into a complex maze of patterns, policies and types of schools — with various exceptions to all of these — which has completely changed the original district design.

At present Boston has mismatched modes of grade progression through the school system, as follows: 8-4; 5-4-4; and 6-3-3. This system is further complicated by the possibility of transferring, or being transferred, from one progression into another. With the exception of special examination schools and trade programs, the moving of students who graduate from one school into the next level

school is accomplished by feeder patterns. A feeder pattern channels students from one or more schools in one level into one or more schools at anther level. Feeder patterns, as distinguished from the intra-district progression method, began to be the primary method of funneling students in 1967-68 when the grade system was changed by the introduction of middle schools. After the opening of four middle schools, a plan for the conversion of the entire system to this grade design has apparently been abandoned or postponed indefinitely.

Boston's schools at the middle, junior and senior high levels now obtain students from large parts of the city. Some students, such as those in South Boston, East Boston, and Charlestown, still move through schools in those areas as if they were district schools; however, their schools also serve large numbers of students from other parts of the city.

At present three of Boston's high schools admit students by examination; four others admit students from all parts of the city; three admit students from specified districts as well as from all parts of the city; eight admit from specified districts, except that eligibility for their vocational training programs is citywide. The junior high and middle schools have equally complex methods of filling their classrooms.

As for elementary schools, the city has a complex maze of single school and multi-school districts which vary widely in size. The elementary schools generally cannot be fairly characterized as neighborhood schools. District lines require some students to travel many blocks to a school when there is another school much closer, but on the other side of that district line. In multi-school districts, students at least when enrolling for the first time have a complete option as to which school to attend and often walk past one en route to another. Some elementary

schools, community schools and magnet schools are further affected by other programs. Community schools have been designed and constructed with a view to involving the nearby community and their facilities are available to adults after school hours. Some have swimming pools and other athletic facilities and all provide meeting places for community organizations. There are nine such elementary schools and one junior high, the Cleveland. Magnet schools, of which there are four, have districts which are smaller than would be normal for their capacities. The idea is that students from outside of the district and outside of the city will be attracted to attend them in order to take special courses. Two, Trotter and Hennigan, were built in non-white neighborhoods. Whites attracted to these schools were supposed to fill vacant seats after students residing in the district were seated.

Three schools, an elementary (Trotter), a junior high (Lewis) and a senior high (Copley Square), comprise a so-called model demonstration subsystem. Until federal funds were cut off, they received approximately 30%, 40% and 50% respectively of their financing from the federal government under Title I of the Elementary and Secondary Education Act, 20 U.S.C. §§ 241a-244, because of special programs designed to aid disadvantaged children of parents receiving Aid to Families with Dependent Children. Eligible white students from outside Boston, from between 15 to 20 suburban communities, are bused at no charge to and from these schools.

Approximately one-third of Boston's students, a large majority of whom are in high school, use buses or other public transportation to travel to and from school. Approximately 3,000 elementary students are transported at city expense, most of whom attend schools over a mile away from their homes. In Charlestown some elementary students who live less than a mile from school are bused

for safety reasons. Other elementary students are bused several miles, e.g., from the Dearborn district in Roxbury to the North End and East Boston; others from the South End to Brighton. The three examination high schools, sometimes called the "elite schools", were served in the school year 1971-72 by a combined total of 63 buses on 35 routes. Many other students travel between distant parts of the city.

Two programs for transporting black pupils to predominantly white schools were started by black parents as private projects and later financed by the state. One, called Exodus, buses blacks within the city, at its peak in 1969 it handled 1,100 pupils, a figure reduced to 170 in 1972. The other, which started in 1966 and is called Metco after its sponser the Metropolitan Council for Educational Opportunities, takes black pupils to schools in the suburbs; the number transported has increased steadily and now totals approximately 1,650.

The Degree of School Segregation

The Boston public schools are characterized by heavy concentrations of black pupils in some schools and heavy concentrations of white pupils in other schools. As of the 1971-72 school year, during which this action was filed, approximately 96,000 students were enrolled in the system, of whom about 59,300, or 61%, were white; 30,600, or 32% were black; and 6,500, or 7%, were other minorities. This overall ratio, which still exists, is far out of line with the ratios in most of the system's schools. Eighty-four percent of Boston's white students attend schools that are more than 80% white; 62% of the black students attend schools that are more than 70% black. At least 80% of Boston's schools are segregated in the sense that their racial compositions are sharply out of line with the racial composition of the Boston public school system as a whole. *Johnson* v. *San Francisco Unified School District,* N.D.

Cal. 1971, 339 F. Supp. 1315, 1329. See also *Swann* v. *Board of Education*, 1971, 402 U.S. 1, 25-26. Racial segregation permeates schools in all areas of the city, all grade levels, and all types of schools.

Boston has eighteen high schools. Only one, Boston High, which features a work-study program, reflects the racial composition of the student population in the Boston school system. Only one other, Brighton High, is within 10% of that makeup. Five high schools are in excess of 90% white. Three others are 85% white. Two high schools are 90% black and have a white student population of 2% or less. Four others have a more than 50% black composition: 52%, 66%, 66% and 75%. The two remaining high schools have a combined black and other-minority enrollment in excess of 55%. This pattern persists at specialized schools: Boston Latin and Girls Latin, special examination schools for college preparatory work, are 93% white and 89% white respectively. The trade schools in Boston are similarly segregated: Boston Technical, 84% white; Boston Trade, 66% black; and Girls Trade, 75% black.

A similar pattern obtains in the junior high and middle schools. Boston's four middle schools are 94% black, 86% black, 72% black, and 63% black. Of fifteen junior highs, six are over 90% white, one is 88% white, one 81% white. Three junior highs are 95% black. Only the Edison and Taft junior highs approach the racial makeup of the school system, but they miss that by 10% and 20% black shortages respectively.

Boston has ten elementary schools ending in grade eight. Five have enrollments greater than 82% white; one is 94% black; another, a combination of 78% black and 15% other-minority. Two others are more than 60% black and other minorities. The other 140 or so elementary schools in the city, in which the highest grades are fifth or sixth, have similar compositions. Sixty-two are less than 5% black;

thirty-two are 85% or more black. The remaining elementary schools also have attendance ratios sharply out of line with the racial makeup of the school system. Only five of these approximately 140 elementary schools, Marshall, Taylor, Barrett, Stone and Curley, have a racial composition within ten percent of the citywide 61:32 ratio of whites to blacks.

Teachers are also segregated. Seventy-five percent of Boston's black teachers are in schools more than 50% black. Eighty-one schools have never had a black teacher.

The Boston public school system is thus characterized by racial segregation. The defendants do not dispute this central fact. The dispute, rather, is how the schools have become and remained that way. The court's primary task is to determine whether the defendants have intentionally and purposefully caused or maintained racial segregation in meaningful or significant segments of the Boston public school system, in violation of the Fourteenth Amendment. *Keyes* v. *School District No. 1, Denver, Colorado,* 1973, 413 U.S. 189; *Swann* v. *Board of Education,* 1971, 402 U.S. 1; *Brown* v. *Board of Education,* 1954, 347 U.S. 483; *Davis* v. *School Dist. of Pontiac, Inc.,* E.D. Mich. 1970, 309 F. Supp 734, *aff'd* 6 Cir. 443 F.2d 573, *cert. denied,* 1971, 404 U.S. 913. In making this determination, the court has analyzed the defendants' conduct in six principal areas, to be discussed separately, as follows, (1) facilities utilization and new structures, (2) districting and redistricting, (3) feeder patterns, (4) open enrollment and controlled transfers, (5) faculty and staff and (6) vocational and examination schools.

I

Facilities Utilization and New Structures

The plaintiff and the defendants presented much evidence pertaining to overcrowding, the use of portable facilities, and new annexes and schools. The crucial evi-

dence consisted not only of the decisions on the use of school facilities but also of the complex contexts in which these decisions were made. Thus the planning, timing, educational justifications and other factors all pertain to intent or purpose. The effect of school officials' actions is more readily apparent. The first relevant facet of the situation is the crowded condition of some schools.

Overcrowding

The Boston system is oddly riddled with groupings of school facilities at each grade level that are extremely overcrowded. These overcrowded schools stand in stark contrast to other facilities at all grade levels which operate far under their capacity. Generally, the overcrowded schools are predominantly white and the under-utilized schools are predominantly black. The following tables for the school year 1971-72 demonstrate this condition with several of the more extreme situations in the high schools, junior highs and one middle school:

	Racial Makeup		
*Overcrowded Schools**	B%	OM%	W%
Charlestown High	2.0	6.6	91.4
Dorchester High	52.2	1.1	46.8
Hyde Park High	15.3	.7	84.1
Roslindale High	5.1	1.6	93.3
South Boston High	0	.7	99.3
Cleveland Jr. High	7.1	1.8	91.2
Gavin Jr. High	1.8	1.8	96.4
Rogers Jr. High	3.3	.4	96.3
*Underutilized Schools**			
Boys Trade	66.5	6.9	26.6
English High	66.7	8.5	24.8
Girls Trade	74.9	5.1	20.0
Girls High	91.7	5.8	2.5
Jeremiah Burke High	89.0	10.1	.9
King Middle School	94.4	5.4	.2
Timilty Jr. High	95.0	3.1	1.8

* Overcrowded signifies a school with substantially more students in attendance than its capacity as calculated by school officials; underutilized signifies a school having a substantial number of vacant seats.

In some instances this overcrowding has been extreme, e.g., South Boston High, all-white, was overenrolled by 676 students in the 1971-72 school year. In contrast, Girls High, 92% black was underenrolled by 532 places.

These patterns are also observable at the elementary level.

	Available Seats		
Identifiably Black	1971-72	1970-71	1969-70
P. Brooks	108	88	107
Q. Dickerman	75	66	45
Mackey	83	51	—
Bancroft	60	66	—
Williams	73	70	—
Carter Temporary	79	—	—
Dudley	156	131	—
Bacon	79	60	—
Dillaway	145	136	—
Hale	55	58	—
J. Bates	52	51	68
Lincoln	153	47	143

	Enrollment Over Capacity		
Identifiably White	1971-72	1970-71	1969-70
Everett	126	138	153
Russell	27	48	18
Clap	68	76	52
O'Hearn	54	48	57
Hemenway	128	111	98
Mather	110	123	134
Southworth	16	42	74
Cushing	29	95	42
Chittick	108	122	121
Longfellow	102	112	116

Overcrowding is educationally damaging partly because it strains the capacity of core facilities such as libraries, classrooms, science laboratories and trade shops. The adverse educational effects of overcrowding within a school facility are so obvious that we shall not discuss it further except to note that by words and deeds the defendants [10]

[10] Where the word "defendants" is unmodified in these findings, it refers only to the city defendants.

often acknowledged that fact. However, the defendants have responded on at least one occasion to the problem of overcrowding with actions contrary to sound educational practice. In alleviating overcrowding at Cleveland junior high, 91% white, students were assigned to the already overcrowded and relatively distant white South Boston High. There were closer schools with available seats but these schools were identifiably black. Similarly, when it would have reduced racial segregation, the defendants ignored other opportunities to decrease overcrowding by altering school assignments, viz., the group assignment and busing of black students to the Weld school, nearly every use of portable classrooms and the opening of the Lee school.

While it would not always have been necessary, busing was a viable alternative to overcrowding. Boston buses several thousand school pupils. In June 1971 defendants proposed busing 4,000 inner city black students as much as fifteen to twenty miles to suburban schools in exchange for an equal number of white students from the suburbs. The defendants have not felt constrained by the busing restrictions in the Racial Imbalance Act, Mass. G.L. c. 71, § 37D, which they correctly viewed as constraining state officials only.

Some evidence tended to show an explicit racial reason for not relieving overcrowding. For example, Deputy Superintendent Meagher did not consider assigning students from overcrowded white schools to black schools with available space because he "thought it would create a problem" of white parents protesting. Assistant Superintendent Griffith did not favor such assignments because he knew that white parents were opposed to such transfers.

On several occasions defendants pursued a policy of reducing overcrowding when it would not affect the racial

composition of the schools involved, e.g., changing the boundary lines of the Cleveland and Campbell (now King) districts in 1959 and the Boardman district in 1964, housing overflow students from English High in the Roosevelt and Edison Schools from 1964 until 1970, assigning blacks from overcrowded schools to the Weld from 1970 until 1972, and transporting the entire Kennedy school fourth grade to the Boardman in 1969 due to overcrowding at the Kennedy.

Finally, the defendants deliberately dragged their feet in formulating plans to lessen overcrowding as well as racial imbalance generally. They constantly delayed the presentation of plans requested by the state board until the last possible moment. For example, a plan to balance high schools in South Boston, East Boston and Charlestown was under discussion at a school committee meeting on June 1, 1971 when the superintendent stated, referring to the commissioner of education, "If you want my quick reaction to it, I'd hold this plan in my back pocket until he demands it."

Thus the defendants have recognized the educational hazards of overcrowding but have acted inconsistently on the basis of the race of the students being harmed. The following subdivisions deal specifically with affirmative acts of the defendants related to overcrowding which we find intentionally created or maintained racial segregation.

Portable Classrooms

Portable classrooms are semi-mobile, one classroom buildings which are designed for quick temporary service without large capital expenditures. Boston has used them since the 1960's to alleviate the overcrowding of some schools. The use of these facilities and the defendants' contradictory statements regarding their use are highly probative.

In 1967 the city placed 50 of these units at various schools in the city. The following tables demonstrate how they were used to alleviate overcrowding at predominantly white schools:

No. of Schools	*Percentage Black*	*No. of Portables*
10	0— 5%	24
4	5— 15%	20
0	15— 30%	0
2	30— 50%	5
1	50— 70%	1
0	70—100%	0

In 1972-73 there were 46 in use and their location was as follows:

No. of Schools	*Percentage Black*	*No. of Portables*
6	0— 5%	26
4	5— 15%	8
1	15— 30%	3
2	30— 50%	5
0	50— 70%	0
2	70—100%	4

Portables were used to alleviate overcrowding when available nonsegregative methods, such as changing district lines and reassigning students, could have achieved the same result. The use of these portables perpetuated the racial concentrations present in both the overcrowded schools and the schools to which displaced students might have been sent.

The city defendants' policy regarding the use of portables has shifted back and forth, depending on whether their use was proposed as a means of reducing segregation or of correcting overcrowding at predominantly white schools. The Kiernan Report recommended their use for the former purpose, but in June 1965 the defendants decided against it because portables had been proved to be, in Superintendent Ohrenberger's phrase, "educationally undesirable." Simultaneously, however, their use for the latter purpose was under consideration and on September 13, 1965 the committee voted to place portables in South Boston. According to the then chairman, a reason for this was that "there

would be no question regarding the racial imbalance question." In February and June 1966 the state task force on racial imbalance criticized plans submitted by the committee for failing to propose, among other things, the use of portables to reduce racial imbalance. On June 2, 1966 the committee again rejected the idea, with various members raising objections of expense and parental opposition. But on March 6, 1967, the committee approved the use of 38 new portables to control overcrowding. Again in 1968, 1969 and 1971 the school committee declined to follow state board proposals for the use of portables in the city's racial imbalance plans for those years.

New Facilities

Boston has increased its seating capacity by the construction of new schools, the building of annexes and the acquisition and conversion to schools of such diverse structures as a church, a synagogue, an automobile showroom, a bowling alley and a bathhouse. The overwhelming effect of most of these projects has been to increase racial segregation. The following table shows the racial composition of these new schools or annexes upon opening:

Facility	*School Year Opened**	*Racial Makeup upon Opening* B%	OM%	W%
Lewis Senior Annex	1967 ('67-'68 only)	98.6	0	1.4
Garrison Annex	1970	98.4	1.6	0
Paine Annex	1970	91.5	1.6	6.9
Weld	1970 (closed '72)	87.1	5.8	7.1
Bradford Annex	1969	81.2	9.4	9.4
Lewis Middle Annex	1970 ('70-'71 only)	79.1	.9	20.0
Tobin Annex	1969	74.6	14.5	10.9
Carter Temporary	1971	72.6	4.7	22.7
Kennedy Annex	1969 ('69-'70 only)	60.7	15.2	24.1
Copley Square High	1968	56.3	3.0	40.7
Dorchester Annex	1970	53.1	.5	46.4
Haley	1971	47.2	8.7	44.1
Boston High	1968	39.8	2.0	58.2
Hamilton Annex	1970	11.3	1.0	87.6
Georgetown Kd.	1970 (closed '72)	3.0	.4	96.6

Charlestown Annex	1971	2.0	6.6	91.4
Sumner Annex	1969	1.9	.9	97.2
Dean	1972	1.0	3.0	96.0
L Street Annex	1970	.7	2.3	97.0
Hart	1972	.5	8.3	91.2

Contrary to the command of the Racial Imbalance Act that "[t]he prevention or elimination of racial imbalance shall be an objective in all decisions involving the selection of new school sites", Mass. G.L. c. 71, § 37C, and that plans should detail "proposed additions to existing school buildings", § 37D, the defendants took the position that the effect on racial imbalance was irrelevant to the planning of several of these new facilities. Significantly, many of the annexes that were not subjected to state scrutiny, because constructed without state financial aid of any sort, opened identifiably black. If state aid had been applied for when these facilities were being planned, the state board would routinely have inquired about their probable impact on racial imbalance. Evidently the defendants preferred not to have to respond to that type of inquiry. From the percentages and circumstances already described, and the specific episodes which follow, it is apparent that, in the matter of facilities utilization and new structures, the defendants were covertly resisting the elimination of racial imbalance and endeavoring to perpetuate racially segregated schools.

(a) *The Weld School.* This school, located in Roslindale, where 98% of the residents were white, was opened in September 1970 after purchase from the Archdiocese of Boston for which it had been a parochial school. For two school years, 1970-71 and 1971-72, it was used to relieve an overcrowded situation in the 90% black Bradford-Walcott district a mile and one-half away. There approximately 130 non-white students and 11 white students were selected

* During the same period, three successive bilingual schools were opened, all 100% other-minority.

mostly by lot and assigned to the Weld, where they were joined by 14 students from the vicinity who suffered from visual handicaps. Weld opened 87% black, 6% other-minority and 7% white. After comemncement of the instant action and objections by the state board, HEW and representatives of the black community, Weld was closed. It may be, as contended by defendants, that it was planned from the start as a temporary facility. This does not explain, however, why none of the regular, i.e., non-handicapped, students from the neighborhood of Weld were assigned to attend it. Moreover, nearly all of the 57 first and second grade black pupils might have been assigned, with no greater inconvenience, to vacant seats in predominantly white schools in the Sumner and Longfellow districts. Parents of the black students were given no choice about their children being bused distances of from one and a half to two miles. Theretofore the defendants had adhered to a policy of busing only on a voluntary basis. The first attempt by the defendants to ascertain the attitude of black parents toward busing to Weld came in April 1972, three months before the school was closed.

The defendants have argued that the reason for transporting the Bradford-Walcott students to the Weld school was to keep existing friendships intact. This argument must be rejected because there is no evidence that this reason was considered by the defendants before busing was undertaken; the evidence supporting it appears exclusively in documents prepared after HEW and the state board charged the defendants with discrimination in relation to the Weld school.

(b) *The Hennigan School.* This new elementary school was proposed in 1967 as part of Boston's first stage racial imbalance plan and was built with 65% state financing as a replacement for the Jefferson school which had a capacity of 500 students. One wing of the school was opened in 1971

with 302 students, 65% black, 10% other-minority and 25% white. The school had a capacity of 1,080 students and was planned to accommodate students residing in the nearby Heath Street housing project, 99% black, and white students to be recruited from outside the district. The defendants made no effort to recruit white students for the 1971 opening.[11] As a consequence of its location and defendants' action, the school was identified as tailored for black students. Thus in the following year, the defendants distributed 50,000 recruiting brochures but garnered only 50 white recruits. A three-day "open-house" in June 1972 was the last effort made by the committee. The entire school opened in the fall of 1972, 62% black, 13% other-minority and 25% white. There is no justification for the defendants' reliance upon obtaining white volunteer students rather than assigning white students to the school. They argue now that failure of the efforts to attract white volunteers to Hennigan could not have been foreseen because, after all, white students voluntarily enrolled in Trotter.[12] But that was in 1969. Times had changed and local opposition to racial balancing was on the rise. In 1971 negligible numbers of white students in the Fifield and O'Hearn districts had volunteered to attend Lee. The analogy also limps because of essential differences between Hennigan and Trotter, which was the elementary school component of the model demonstration subsystem to which white children of AFDC recipients were bused from all over the greater metropolitan area. The attendance of black students at the Hen-

[11] When the state board protested, the defendants responded that the use of one wing for 302 students could not be considered an "opening" of the school.

[12] The defendants' original planning for Trotter, which is located in a heavily black section of the city, did not include recruitment of white students. This feature was added at the insistence of the state defendants on June 28, 1966 when it became clear that otherwise Trotter would open racially imbalanced.

nigan school was mandatory; its racial segregation upon opening could not have come as a surprise.

(c) *The Lee School.* This school was also proposed as part of the first stage racial imbalance plan and was planned to replace kindergarten through grade 5 of the Champlain, Whittier and Nightingale schools. Because its construction was supposed to contribute to racial balance, the state paid 65% of its cost of over $7,000,000 pursuant to Mass. G.L. c. 15, § 1I. From the beginning the state board pressed the school committee for assurances that the Lee would open racially balanced. On June 1, 1971 the school committee decided to include within the new Lee district approximately 350 white pupils then attending the Fifield and O'Hearn schools but gave them the option of attending their former schools. This was done in the face of warnings by Mr. Coakley of the city's Educational Planning Center (EPC) that the option would produce an imbalanced school. On July 12, 1971 the committee was presented with hard evidence that the Fifield-O'Hearn option would produce an imbalanced Lee; it was told that no O'Hearn parents at all and the parents of only 37 Fifield pupils had indicated that they would send their children to the Lee. To compel reconsideration, the state board threatened to withhold state funds. So on August 23, 1971, barely two weeks before the beginning of school, the committee eliminated the Fifield-O'Hearn option by a 3-2 vote. Significanly neither the principal of Lee school, Miss Kelley, who had worked many months to assure a successful opening, nor the Fifield and O'Hearn parents were told of the August 23 vote.

Opening day at Lee school, September 8, was chaotic. Approximately 200 black students from the predominantly black Franklin Field housing project nearby illegally registered by giving false addresses and occupied seats. The Fifield and O'Hearn pupils registered at their former schools, refusing to go to Lee. Confronted with this situa-

tion, the committee on September 17 scheduled a public meeting at the O'Hearn school on September 21, and, with one member switching his vote, reinstated the Fifield-O'Hearn option and allowed the black sit-in pupils to remain at Lee. The finding of the Superior Court, to which the defendants are bound, was that "this vote was a measure of expedience in the face of public furor." *Boston School Committee* v. *Board of Education,* Suffolk Sup. Ct., No. 94254, at 42. We add that, to a large extent, the crisis was of the committee's own making.[13]

The defendants acted in such a way as to lead all parties concerned to believe that it would not compel the Fifield and O'Hearn pupils to attend Lee. It did virtually nothing to encourage the parents of those students to send them to Lee, even when it became inevitable that Lee would open racially imbalanced if those students were not in attendance. The intent of the defendants was apparent all along: they never intended to take the initiative in seeing that Lee would open racially balanced. The segregated consequences were clearly foreseeable.

Parenthetically, assignment of Fifield and O'Hearn pupils to Lee would have alleviated overcrowding at those schools. Educational considerations thus did not justify the defendants' failure to advance integration at Lee. Moreover, the routes from Fifield and O'Hearn were safe and no transportation was necessary. Safety considerations thus did not explain the school committee's actions.

The defendants have sought to justify their capitulation of September 21 on the ground that the black pupils who illegally registered at Lee were adamant about staying and the Fifield-O'Hearn option was reinstated to prevent overcrowding at Lee. This proffered theory is pure rationalization and completely unsupported by contemporaneous evi-

[13] Although the crises ended in 1971, the defendants have still done nothing to redistrict Lee, which is now more than 80% black.

dence of the reasons for the committee's action. Furthermore, permitting the Fifield and O'Hearn pupils to return to their former schools merely perpetuated overcrowding at those schools. Finally, the defendants' suggestion that, but for the illegal registration of 200 black students, they might have recruited white students from other sections of the city to attend Lee overlooks the fact that the recruiting season had ended as of opening day.

(d) *New English High School.* In September 1973, English High, which is located in the Back Bay Fens section of the city near several colleges, hospitals and museums, was moved next door into a new $24,000,000 facility ten stories high, the first new high school opened in Boston in 35 years. The transfer did not materially affect racial segregation. However, it came only after a single justice of the Supreme Judicial Court had nullified a 3-2 vote of the school committee awarding the facility to another high school, Girls Latin, and the events leading up to it bear on the issue of defendants'[14] intent.

The new building would accommodate roughly 2,000 students. The enrollments at both English and Girls Latin were almost identical, just short of 1,200 students each. The new building was designed and constructed to house English, with special facilities for courses in business, merchandising, electronics, carpentry, motor repair, and other courses which would not fit the Girls Latin college preparatory curriculum. The new building was constructed with 65% state financial assistance under plans formulated in 1967 and 1968 to reduce racial imbalance. The single justice found on all the evidence presented to him that the defendants made a commitment to the state board that English would be housed in the new tower facility upon its

[14] In this instance "defendants" refers to the city defendants other than the new superintendent of schools, Leary, who opposed the school committee's action.

opening, but intended by their vote of April 23, 1973[15] to exclude English from the tower facility upon its opening. Substantially the same evidence was presented to this court when, after trial, the case was reopened on plaintiffs' motion, and we agree with the state court's findings.

Why did the school committee try to renege on its commitment to the state? Plaintiffs contend that it was because the composition of the student body at English had changed from approximately 20% black in 1967, when the new building was planned, to over 80% black in 1973 when, on the eve of its opening, it was awarded to Girls Latin, 89% white. Plaintiffs have requested a finding that the committee placed the black students at English "in the position of what may be described as second-class pupils", citing *Lee* v. *Macon County Board of Education,* 5 Cir. 1971, 448 F.2d 746, 754 n. 12 quoting *Brice* v. *Landis,* N.D. Cal. 1969, 314 F.Supp. 974, 978. Plaintiffs' requested finding raises a question whether blacks were denied educational opportunity, cf. *Hobson* v. *Hanson,* D. D.C. 1967, 269 F.Supp. 401, *aff'd sub nom. Smuck* v. *Hobson,* D.C. Cir. 1969, 408 F.2d 175, which we do not reach because the committee was enjoined by the state court from carrying out its vote. The issue before us is primarily one of segregative intent. On that issue, there is evidence that the defendants intended to keep English's student body heavily black, and we so find.

As explained in the division of this opinion entitled "Feeder Paterns", the rapid change from 20% to 80% black in the racial composition of the student body at English, which is undistricted, i.e., with students from all

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[15] The material facts and background of the school committee's vote are set forth in detail in the findings, rulings and decree of the single justice dated July 16, 1973 in *Bradshaw et al.* v. *Tierney et al.*, Suffolk County No. 73-91 Eq., and companion cases. The committee appealed to the full bench but later withdrew its appeal.

parts of the city, was attributable in large measure to feeder patterns knowingly implemented by the defendants. The new facility had capacity for approximately 700 students in addition to the number attending the old English; the committee had advised the state board that this excess capacity would be used for white students, thus balancing it racially; and the headmaster and staff at English had developed courses and projects which would probably have made this goal attainable, especially if combined with feeder pattern changes which the headmaster recommended repeatedly but to no avail. After the committee's vote awarding the new facility to Girls Latin, 89% white, the ancient building which had been occupied by English was razed and the defendants made no plans for housing English other than in the building in Codman Square which had been occupied by Girls Latin. True, as argued here by the defendants, the students at English were never formally assigned to the building which would have been vacated by Girls Latin; but as a practical matter there was no alternative—the only word given the English headmaster by his superiors was that English would be moved to that building. The building at Codman Square, which incidentally is almost as antiquated as the old English building, is located on the border of a heavily black neighborhood. Had English been sent there, it would have been more firmly identifiable as tailored for the education of blacks.

II

Districting and Redistricting

Districting denotes the drawing of geographical boundaries which will determine attendance zones for a given school facility. In Boston, districting is a misnomer as applied to high schools because their attendance is either citywide or determined by feeder patterns geared to schools rather than to geographical areas. Even high schools located

in definite sections of the city, e.g., Brighton and Roslindale, receive students on the basis of the intermediate schools from which they have graduated. Feeder patterns thus control the composition of the student bodies at secondary schools; and, while they serve the same purpose as the drawing of geographical boundaries, they will be discussed in subdivision III. Intermediate schools are all districted geographically, although five of them also receive students by way of feeder patterns and there is at least one instance of overlapping intermediate school districts. The student bodies at primary schools are determined entirely on the basis of residence. Each level of schools, intermediate and primary, obviously requires districting of its own.

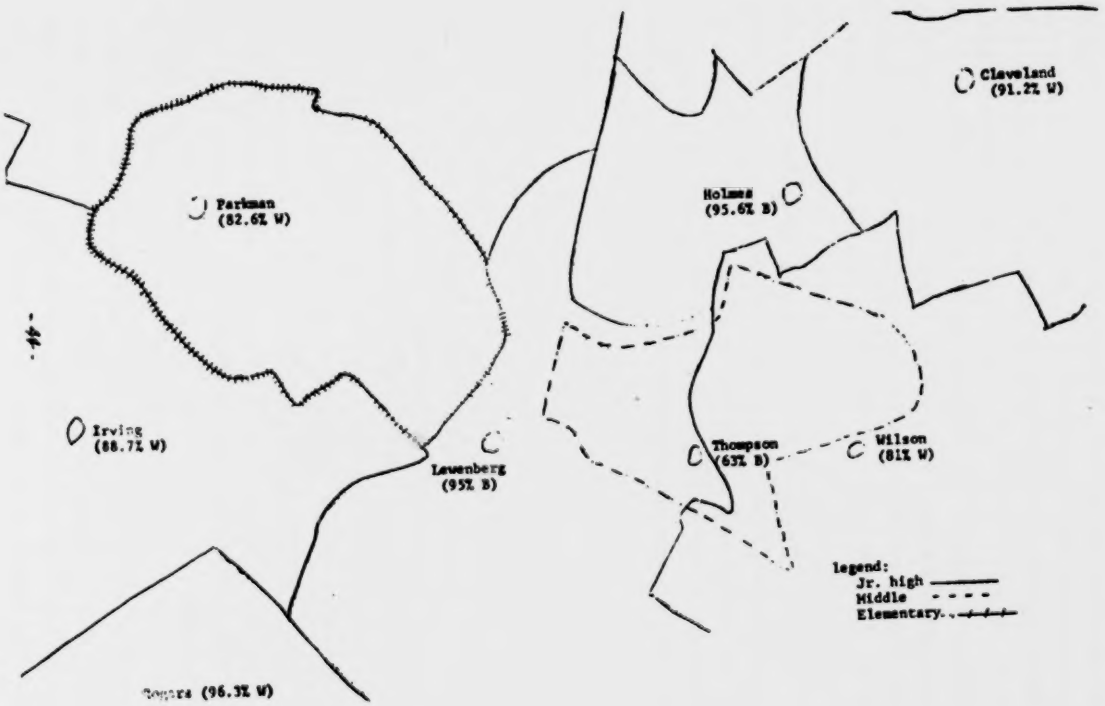
Districting has much less to do with what school a pupil will attend in Boston than it may in other communities. This is because of practices which cut across district lines, such as the controlled transfer policy with its several loopholes, feeder patterns and specialized schools. Another reason is the existence of multi-school districts at the elementary level which are administered by a district principal and in which there are as many as six separate buildings in different parts of the district. Whether these various features are unique to Boston was not indicated. Surely, however, they are not characteristic of most of the public school systems in Massachusetts.

The defendants have not made districting changes which brought about increased segregation where there was none before, with the exception of districting changes pertaining to certain fifth and sixth grades giving advanced work classes leading to the three elite schools, which are too involved to warrant explanation here.[16] However the defend-

[16] These advanced classes, 15 for grade five and 16 for grade six, were located in twenty elementary schools and constituted "tracks" to the three examination schools. Racial compositions were in evidence for 1970-71 and 1971-72. An average total of 570 students were in these classes of whom white students comprised more than 80%.

ants have made districting changes for the purpose of perpetuating racial segregation, and findings will be made about them. The bulk of the findings in this subdivision will describe extreme disparities in the racial composition of adjacent districts and the defendants' uncompromising resistance to redistricting when it would have reduced racial segregation. Year after year the defendants rejected proposals for redistricting carefully drawn with a view to lessening racial imbalance while at all times displaying awareness of the potential racial impact of their actions. Despite intense pressure from private groups and the state board, including the withholding of millions of dollars in state financial assistance, the defendants defeated or evaded successive redistricting proposals, for the purpose of perpetuating the existing segregated system.

In the Dorchester section of Boston, district lines at the intermediate school level preserve a high degree of racial segregation in adjacent districts. The following findings pertain to a cluster of eight districts, six for junior high schools, one for an elementary school ending in grade eight, Parkman, and one for a middle school, Thompson, whose district overlaps portions of the Lewenberg district, 95% black, and the Wilson, 81% white. The Holmes district, 95% black, whose eastern and western district lines are near the edges of the "black boomerang", is adjacent on the east to the Cleveland, 91% white. To the south of the Holmes and Cleveland districts are the Lewenberg district, 95% black, the Wilson, 82% white, and the Thompson, 63% black. The district for Thompson, a middle school, is completely surrounded by the Lewenberg district, 95% black, and the Wilson, 82% white. Graphically the area is depicted roughly as follows:


Cleveland
(91.2% W)
Parkman
(82.6% W)
Holmes
(95.6% B)
Irving
(88.7% W)
Leuenberg
(95% B)
Thompson
(63% B)
Wilson
(81% W)
legend:
Jr. high
Middle
Elementary

These districts shown in the map cover an area about three miles from east to west and two miles north to south. Their configuration results in nearly the maximum possible amount of racial isolation at these schools. Only small sections of the district lines coincide with natural boundaries, Blue Hill Avenue and a railroad track, and the latter runs either overhead or under street level. A slight boundary change between the Holmes and Cleveland districts would decrease racial imbalance at both schools and would also eliminate the situation now existing whereby pupils who are within a few blocks of Holmes, 95% black, must attend the relatively distant Cleveland, 91% white. Portions of the Wilson district, 81% white, are closer to Holmes junior high, 95% black, and Lewenberg, 95% black, than to Wilson, 81% white. Portions of the Lewenberg district are as close to Wilson junior high as to the Lewenberg, and other portions of the Lewenberg district are almost as close to Rogers junior high, 96% white, or Irving, 88% white, or even to Parkman, 83% white, as they are to Lewenberg. Parts of the Irving district are three times as close to Lewenberg junior high as to Irving. The feasibility of a Lewenberg to Rogers or Irving switch is corroborated by the school committee's ad hoc decision in 1972 which allowed several white elementary school graduates who lived in the Lewenberg district to attend the predominantly white Irving or Rogers junior highs rather than the predominantly black Lewenberg. The Thompson middle school district, 63% black, was created in 1968 with the conversion of an elementary school and was superimposed upon the predominantly white Wilson and the predominantly black Lewenberg. The effect of this districting was to provide students residing in the eastern part of the Thompson

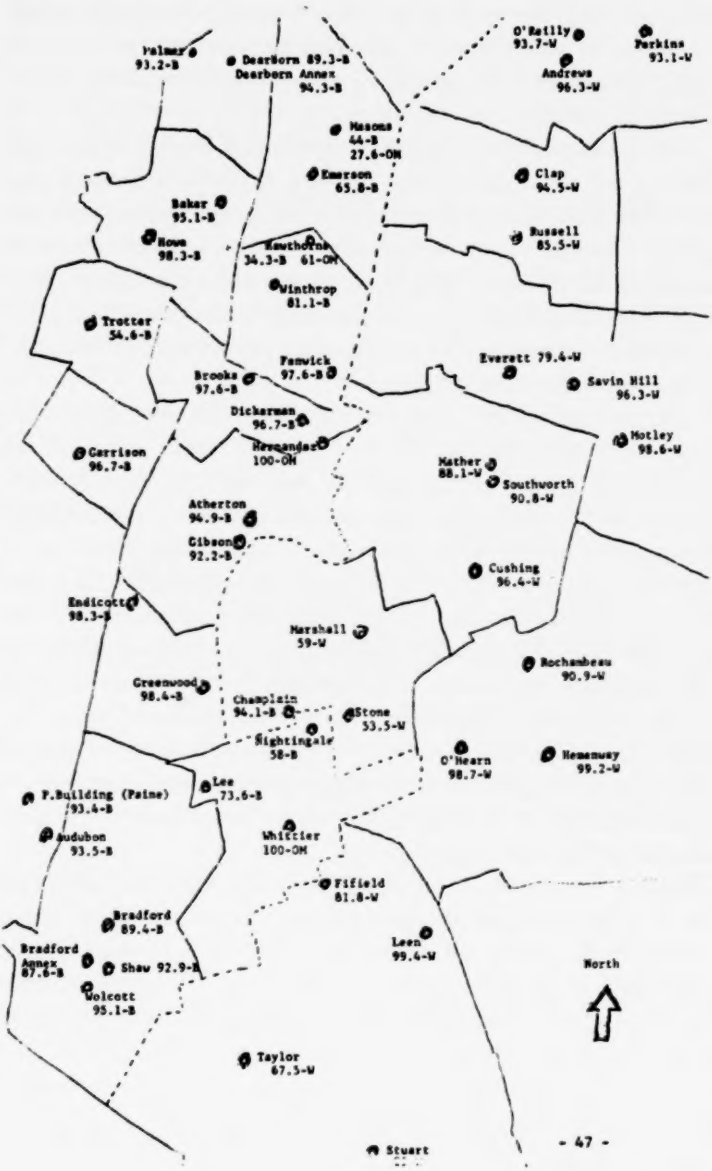
district with the option of attending Wilson junior high, 81% white, and those in the western part of the Thompson district with the option of attending Lewenberg junior high, 95% black.[17]

The elementary schools in a portion of Boston stretching from just south of South Boston, through Roxbury and into Dorchester are districted with a similar effect: the predominantly black areas are cut away from the predominantly white areas. The following map shows how the district lines weave in and out with this effect; the broken line depicts the dividing line between the white and black elementary districts.

As shown in the map, on the west lie predominantly black schools; the easternmost edge of their districts coincides with this dividing line. Noticeably, the predominantly white schools to the east are located some distance away from the dividing line. The single exception to this pattern of separation is Champlain, 94% black, and that elementary school is practically on the district line. There are no natural barriers which explain this north-south dividing line; there is a railroad line which coincides with parts of it, but the tracks are either elevated or below street level. Moreover, the same railroad line runs through the middle of at least six elementary school districts in that vicinity: Northeross, Gibson, Welcott-Bradford, Tileston, Chittick and Lee.

Racial segregation of elementary students is facilitated by another feature of the city's elementary school districts, viz., multi-school districts. Of such districts, only six have significant numbers of students with different racial backgrounds and they are segregated according to race at particular schools within the districts. This is

[17] The effect of teacher placement on choices such as these will be discussed, *infra*.


Palmer 93.2-B
Dearborn 89.3-B
Dearborn Annex 94.3-B
O'Reilly 93.7-W
Perkins 93.1-W
Andrews 96.3-W
Masons 44-B 27.6-OH
Emerson 65.8-B
Clap 94.5-W
Baker 95.1-B
Russell 85.5-W
Hawthorne 34.3-B 61-OH
Winthrop 81.1-B
Trotter 54.6-B
Everett 79.4-W
Savin Hill 96.3-W
Brooks 97.6-B
Fanwick 97.6-B
Dickerman 96.7-B
Motley 98.6-W
Garrison 96.7-B
Alexander 100-OH
Mather 88.1-W
Southworth 90.8-W
Atherton 96.9-B
Gibson 92.2-B
Cushing 96.4-W
Endicott 98.3-B
Marshall 59-W
Rochambeau 90.9-W
Greenwood 98.4-B
Champlain 94.1-B
Stone 53.5-W
Nightingale 58-B
O'Hearn 98.7-W
Hennessey 99.2-W
P.Building (Paine) 93.4-B
Lee 73.6-B
Audubon 93.5-B
Whittier 100-OH
Fifield 81.8-W
Bradford 89.4-B
Bradford Annex 87.6-B
Shaw 92.9-B
Leon 99.4-W
North
Wolcott 95.1-B
Taylor 67.5-W
Stuart

shown by the following table in which the racial percentages are for the school year 1971-72:

	White	*Other Minority*	*Black*
PARKMAN DISTRICT			
Parkman	82.6	9.2	8.1
Seaver	91.0	.9	8.1
Haley	44.1	8.7	47.2

	White	*Other Minority*	*Black*
SUMNER DISTRICT			
Sumner	95.7	1.3	3
Philbrick	99.5	.5	0
Sumner Annex	93.5	.5	6
Irving Colony	97.2	1.7	1.1
Weld	14.7	3.7	81.7
Conley	99.6	.4	0

	White	*Other Minority*	*Black*
MENDELL DISTRICT			
Fuller	72.4	16.5	11
Mendell	33	39.8	27.2
Roosevelt, T.	11.8	57.1	31.2
(Annex)	.5	3.2	96.2

	White	*Other Minority*	*Black*
MARSHALL DISTRICT			
Marshall	59.0	5.4	35.6
Stone	53.5	4.4	42.1
Champlain	1.1	4.8	94.1

	White	*Other Minority*	*Black*
PRINCE DISTRICT			
Prince	40	14.7	45.3
Faneuil	75.6	8.5	15.8
Perkins	.8	15.2	84.0
Milmore	53.1	27.2	19.7

	White	*Other Minority*	*Black*
RICE-FRANKLIN DISTRICT			
Bancroft	57.9	11.3	30.8
Mackey	15.2	47.1	37.7

As the table demonstrates, these multi-school districts contain district racial clusters. Of the six schools in the

Sumner district, five are in excess of 90% white and the sixth is 81% black. By contrast, in the Mendell district the whites are noticeably concentrated in the Fuller school, while the other two schools are predominantly black and other minority. The schools in the other districts present slightly less extreme examples, but the pattern is evident.

Redistricting, in the sense here discussed, must be further defined. First, it refers to redrawing of old boundaries for old schools and is to be distinguished from new districting necessitated by the construction of new schools or by the conversion of one type of school to a different type, e.g., a grammar to a middle. Secondly, it is a term used only with reference to primary and intermediate schools. Secondary schools have districts only derivatively, i.e., their student bodies are generally determined by the districts of lower level schools whose graduates are routed to them in accordance with feeder patterns, which are discussed in the next division of this opinion. The redistricting of high schools is accomplished, in effect, by assigning and changing feeder patterns. Thus in the present context redistricting means changing attendance zones of existing elementary and intermediate schools.

On several occasions the school committee redistricted when racial balancing was not involved: in 1959 the boundary lines of the districts for Cleveland and Campbell (now King) junior highs were altered for administrative reasons; between 1963-64 and 1969-70 the districts for Roosevelt junior high in Roxbury and Edison junior high in Brighton were changed to house an overflow of students from English high; and in 1969-70 the Boardman district was expanded to accommodate the entire fourth grade at Kennedy due to overcrowding. Between 1954 and 1966, the school committee made sixteen other districting changes.

On at least one occasion the committee redistricted with a view to perpetuating racial segregation. This occurred in 1968 when certain streets in the Cleveland junior high district, 91% white, were transferred to the Russell junior high district, 85% white, and to the South Boston high, 99% white. Approximately 150 students were affected by the change, which was occasioned by overcrowding at Cleveland. At the time both South Boston high and Russell were already overcrowded and were further away from Cleveland than other schools with available seats, namely, King with 295 available seats, Burke with 20 and Girls High with 568. However, these underutilized schools were predominantly black: King, 94%; Burke, 89%; and Girls High, 91%. Assistant Superintendent Griffith testified at the trial that redistricting of the King district to include students from the overcrowded Cleveland would "certainly" have been feasible, but he did not recommend it because he "knew the attitude of the people in the area" and "white parents did not wish their children in schools such as the King and the Holmes, and possible in the Timilty", all of which are predominantly black. Nor would safety hazards have been involved in such a redistricting, at least any more than those already encountered by students attending King.

On no occasion have the city defendants redistricted for the purpose of eliminating racial imbalance, although they have many times been shown the way. The Kiernan Report, filed in April 1965, proposed specific redistricting and was largely ignored by the school committee. Following the city's first census pursuant to the Racial Imbalance Act, Mass. G.L. c. 71, § 37D, the board found that racial imbalance existed in Boston and notified the school committee in writing, thereby placing the committee under a legal duty to file a plan which "shall detail the changes in existing school attendance districts . . . ." The com-

mittee's first plan failed to include any provisions for redistricting and was rejected by the board on February 24, 1966 for that and other reasons. On April 12, 1966 the board voted to hold in escrow state funds due Boston until a revised plan was filed and accepted. In early 1966 the board engaged the services of the Joint Center for Urban Studies of Harvard and MIT, which prepared several alternative redistricting proposals, eight for elementary schools and three for intermediate schools.

In drawing up the proposals the Joint Center conferred regularly with school committee personnel, including the deputy superintendent of schools. Each proposal would have substantially lessened segregation in the parts of the city shown in the maps, *ante*, and each was designed to meet the following requirements:

1. No district should extend more than about one-half mile from the school for grades 1-3, or three-fourths mile from the school for grades 4-6. For junior high schools the maximum is 1¼ miles, unless public transportation is available.
2. Each district should have a compact shape.
3. No child should walk past another school serving his own grade on his way to his assigned school.
4. No more than 30 children per academic classroom should be allocated to any elementary school involved in the redistricting, and no more than 32 per academic classroom to a junior high school. For schools having only minor additions to their districts, the official vacant seat count has been used in lieu of this requirement.
5. No white child should be required to change to a formally imbalanced school unless the reassignment would eliminate racial imbalance in that school, bringing it to 45 percent nonwhite or less.

Safety was considered. The proposals did not affect

kindergartens and did not involve any busing except the use of public transit by some junior high students. They were discussed by the committee at a meeting on June 2, 1966 together with the general problem of steps which might be taken to obtain the release of the state funds being withheld. The transcript of the meeting runs 125 pages and was received in evidence, as were transcripts of many other committee meetings. A majority of the committee were set against redistricting of existing school districts in any form, for various expressed reasons, mainly that it would accomplish relatively little in alleviating racial imbalance, which was due mainly to segregated housing patterns and could never be eliminated anyway, and that transferred faculty [18] and parents of redistricted students would be bitterly opposed. There was considerable talk about distances between schools, dangers at street crossings, the educational unsoundness of overcrowding, etc., as if the Joint Center proposals had ignored these factors. But the basic issue was, in the words of one member, "Either you believe in redistricting or you don't believe in it." At the meeting a stratagem evolved of trying to satisfy the state board with a plan to combat racial imbalance which would not include redistricting of existing schools, but would confine districting decisions to newly constructed schools. The committee agreed to propose a four-point plan featuring new schools, an expansion of the Metco program for exchanging black students from the city for white students from suburban schools, an open enrollment policy and compensatory programs including "sociological student-teacher exchanges" and "multi-ethnic textbooks." Toward the close of the meeting, the chairman, who believed that the funds with-

[18] While the deputy superintendent was explaining the Joint Center proposals, one member asked incredulously, "You mean in addition to the children you have to shove the teachers all over the place also?"

held by the state would never be released unless the city's plan included some provision regarding redistricting and had kept urging "a step forward, a good faith indication that we intend to comply with the law as they [the state board] interpret it", made a motion that the superintendent be directed to review the Joint Center package and "extract from it those recommendations which you can live with and which are workable and will have the effect of" minimizing racial imbalance. The motion lost by a vote of 3-2.

The four-point plan, somewhat modified, was formally adopted by the committee at its next meeting and forwarded to the board on June 13, 1966. The board rejected it on June 28. The committee resubmitted it, unchanged, on July 6. The board rejected it again on July 26. The lines had been drawn and, on the matter of redistricting, the committee and the board have been at swords' points ever since. The board continued to demand plans including redistricting and sought to compel compliance by withholding state financial assistance and obtaining further proposals from the Joint Center. The committee responded with lawsuits in the state courts to compel release of the withheld funds and annual bills in the state legislature, filed by committee members, to repeal the Racial Imbalance Act.[19] In the rhetoric of the committee, redistricting became synonymous with abolition of the neighborhood school, anathema to most parents and to be resisted at all costs.

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[19] At a committee meeting in March, 1970, the associate superintendent reported to the committee concerning the prospects of one such bill, "The only way we are going to get the Imbalance bill repealed —let's face it—is for blacks to be up there to fight for the repeal, which hasn't happened up to this point yet. . . . I have told them that there will be no new schools in Roxbury in the Model City area in Roxbury and North Dorchester unless the Imbalance bill is repealed." Roxbury and North Dorchester are heavily black residential areas of Boston.

In other areas, the committee did submit plans. In 1967, it adopted a plan for the construction of new schools drawing pupils from more than one previously existing district; for the reassignment of pupils in connection with the conversion of certain grammar schools to middle schools for grades 6, 7 and 8; and for the closing of three racially imbalanced schools and the reassignment of their pupils. This plan was approved by the board "as a first step" and became known as the city's First Stage Plan. Second and third stage plans in 1968 and 1969 provided for more new schools, but no redistricting. Meanwhile the number of racially imbalanced schools was increasing steadily, from 49 in 1966 to 62 in 1969.

The committee belatedly adopted a fourth stage plan on June 15, 1971, which was promptly rejected by the board on June 22. On July 12 the committee sent a letter containing other amendments to the plan, which the board rejected on July 20, stating,

> "The letter contains no expression of intent to adopt a plan for redistricting high schools and intermediate schools; it merely proposes further study. The letter also conditions high school redistricting on the development of a metropolitan plan."

Under mounting pressure from the board and the courts, the committee voted further amendments on August 23, one for the revision of district lines and the other for comprehensive racial balancing, as follows,

> "A Citizens' Advisory Committee will be established to review the present district lines for junior high, middle and high schools. Half of the members may be selected by the State Board of Education and half by the Boston School Committee. Staff members of both agencies would be available to assist in the effort. The Committee would present an initial report no later than January 15, 1972 and a Final Report no

later than March 15, 1972. Implementation of new district lines, approved by the School Committee, designed to achieve racial balance in the junior high, middle and high schools shall be put into effect no later than September, 1972."

. . . .

"*Comprehensive Plan*

The process for preparing a Comprehensive Plan for racially balancing the Boston Public Schools will be undertaken as follows:

A. The School Committee will forthwith request technical assistance in preparing a Comprehensive Racial Imbalance Plan from the Commissioner of Education and the U. S. Department of Health, Education and Welfare.

B. A representative Committee of distinguished citizens will be created during the 1971-1972 school year to oversee the planning process carried out by the staff of the Boston School Committee with the assistance of the staff of the State Board of Education. Members of the aforementioned Committee will be selected by the State Board of Education and the Boston School Committee.

C. A timetable for planning will be developed by the aforementioned committee to assure implementation of the Comprehensive Plan, approved by the Boston School Committee, no later than September, 1973.

D. The Plan shall include, among other things, the concept of metropolitanization."

The committee then proceeded to sabotage both proposals. To membership on the Citizens' Advisory Committee it appointed persons known to be vehemently opposed to redistricting and encouraged them to stalemate discussions with members who had been selected by the board. Re-

garding the broader plan, it engaged in a similar charade: on August 31, 1971, the committee chairman wrote to the board, stating in part,

> "In view of the commitment of the Boston School Committee, by its vote of August 23, 1971, to develop a comprehensive plan which will assure an integrated education for all the children of Boston, I am requesting that the Board of Education provide technical assistance to the Boston School Committee in the preparation of alternative plans to eliminate minority-group isolation in the public schools for the consideration of the School Committee, under the provisions of Section 403 of Public Law 88-352. I am also requesting that the Board of Education provide assistance in the presentation, adoption, and planning for implementation of one of these plans."

On December 21, the board wrote to the committee seeking access to pupil data cards and other information necessary if it was to provide the technical assistance requested in the chairman's letter dated August 31. On January 26, 1972, a new chairman of the committee had been installed and the replied that technical assistance from the board would not be in order until after the Citizens' Advisory Committee had completed its work, but that, "Should the need for technical assistance arise in the future, we will make a specific request for it." The other committee, the "representative Committee of distinguished citizens . . . to oversee the planning process", was never even organized; members were not even appointed.

III

Feeder Patterns

At a meeting of the school committee on June 15, 1971, a letter from the state board dated May 28, 1971 enclosing suggested district lines for certain intermediate and high schools came up for discussion, as follows:

Superintendent: They have been screeching for district lines for high schools.

Chairman: We have district lines for district high schools.

Superintendent: We have feeders.

Chairman: South Boston High and Hyde Park High, for example.

Mr. Hambelton (associate superintendent): You don't have geographic boundaries. You have feeder patterns.

Superintendent: You can say that pupils from such and such a school district may go.

Chairman: The school district has geographical boundaries.

Superintendent: That's right. Indirectly the answer is yes.

A few minutes later, when another member started speaking about a high school's "basic district", the discussion went off the record, presumably to reinstruct the member in the esoteric subject of feeder patterns. Some of the confusion is doubtless due to the fact that high schools in identifiable residential sections of Boston, e.g., East Boston, Roslindale and Hyde Park, are thought of as neighborhood schools with natural districts and are usually referred to as "district" high schools. Technically, however, as the superintendent endeavored to explain, high schools do not have geographical districts of their own — they have feeder patterns.

Enrollment at high schools is determined by a combination of seat assignments, preferences and options collectively called feeder patterns. They are promulgated in February of each year in superintendent's circulars which incorporate by reference the geographical boundaries of intermediate school districts. Since 1966 they have always been prepared by Associate Superintendent Meagher; for

many previous years they had always been prepared by Associate Superintendent Tobin. Their operation can be understood only in the context of the various types of high schools in the city and the various types of intermediate schools whose graduates are qualified for high school admission, viz., junior highs, i.e., grades 7, 8 and 9; middle schools, i.e., grades 6, 7 and 8; and elementary schools ending in grade 8. Half of Boston's eighteen high schools are "fed" by all intermediate schools throughout the city and are called "citywide" schools. They are the examination schools, Boys Latin, Girls Latin and Boston Technical; the trade schools, Boys Trade and Girls Trade; the high school component of the model demonstration subsystem, Copley Square High; a special ungraded school offering a work-study program, not mentioned elsewhere in this opinion, Boston High; and two general schools, English High for boys only and Girls High for girls only. The other nine, Brighton, Burke,[20] Charlestown, Dorchester, East Boston, Hyde Park, Jamaica Plain, Roslindale and South Boston, are fed only by designated intermediate schools, with the qualification that under the open enrollment and controlled transfer policies, which permit transfers to fill vacant seats, pupils from anywhere in the city may theoretically attend any high school. This qualification must itself be modified because several "district" high schools have been overcrowded and transfers to them under either policy have been relatively rare. In this division of the opinion, the findings will pertain only to the general, i.e., non-specialized, high schools offering the usual secondary school curriculum, viz., citywide English and Girls (henceforth in this division "Girls" will always

[20] Until September 1972, when all schools in Boston became coeducational, Burke was for girls only. The district high schools other than Burke have always been coeducational.

mean Girls High and not Girls Trade) and the district high schools.

A further distinction between English and Girls and district high schools is that they include ninth grades, whereas six of the district schools, Brighton, Charlestown, Dorchester, Hyde Park, Jamaica Plain (apart from a small ninth grade for agricultural studies) and Roslindale, do not. These six contain only three grades — 10, 11 and 12 — and can be fed only by junior highs, all of which have grades 7, 8 and 9, or by transfers from citywide high schools. The three district high schools with grades 9-12 are East Boston, South Boston and Burke for girls, whose percentages of white students in September 1967 were, respectively, 99%, 100% and 25%. The natural progression of students is obviously from intermediate schools ending in grade 8 to high schools starting with grade 9; and from intermediate schools ending in grade 9 to high schools starting with grade 10. It was one of several factors, together with overcrowding at some schools and the reluctance of blacks to attend virtually all-white schools and of whites to attend virtually all-black schools, which enabled the defendants, by the use of seat preferences and options, to keep the white and black races as separate as practicable at the high school level.

Since Associate Superintendent Meagher took over the responsibility for feeder patterns in 1966, they have been manipulated with segregatory effect. Until then, circulars assigned high school seats only to pupils residing in designated junior high districts; pupils from elementary school districts ending in grade 8 either entered grade 9 at a junior high or enrolled at a citywide high school. In February 1967, on the basis of informal talks with the principals of some of the affected K-8 school districts but without consulting the headmaster at English, Mr. Meagher established feeder patterns for the ten K(indergarten)-8

grade elementary school districts, to become effective the following September at the start of the 1967-68 school year.[21] These ten K-8 school districts are listed according to the percentages of their racial components, with the whitest first; in the parentheses "W" signifies the percentage of white students at that school during the 1967-68 school year, "OM" signifies other-minority, and "B" black students; the schools under "Schools Fed" are high schools unless otherwise indicated:

K-8 Schools	W	OM	B	Schools Fed	W	OM	B
Cheverus	100	—	—	E. Boston	99	—	1
Russell	95.8	.7	3.5	S. Boston	100	—	—
McKay	91.8	—	8.2	E. Boston	99	—	1
Parkman	88.6	.3	11.1	Irving Jr.	93.6	1	6.4
Thompson	72.2	.3	27.5	Lewenberg Jr.	54.2	.5	45.3
				Wilson Jr.	93.2	.3	6.5
Prince	50.6	11.4	38.0	Taft Jr.	77.6	4.2	18.2
				Edison Jr.	78.5	1.5	20
Rice-Franklin*	43.1	22.5	34.4	Burke	24.7	8	66.3
				Girls	14.5	6.4	79
Lincoln	31.7	35.3	33.0	Burke	24.7	8	66.3
				Girls	14.5	6.4	79
Martin*	31.3	2.2	66.5	Burke	24.7	8	66.3
Dearborn	11.4	.4	88.2	Burke	24.7	8	66.3
				English	76	5.3	18.7
				Girls	14.5	6.4	79

* Rice-Franklin has since been renamed Mackey, and Martin renamed Tobin.

[21] At the same time seat preferences for four junior high schools, originally designated in 1963, were reaffirmed: three of them, Michelangelo, 95% white; Timilty, 98% black; and Lewis, 99.8% black, to English High; and one, Barnes, 99% white, to East Boston High.

The effect of seat preferences at the five junior high schools listed in this table can be understood by showing the racial compositions during the school year 1967-68 of the high schools fed by these junior highs pursuant to preexisting feeder patterns. The high schools, all containing grades 10-12, at which they had seat preferences, and the years when first established are as follows:

Junior Highs		Schools Fed	W	OM	B
Irving	1958	Roslindale	96.6	—	3.4
Lewenberg	1958	Dorchester	79.1	.3	20.6
	1962	Hyde Park	96	.3	3.7
Wilson	1958	Dorchester	79.1	.3	20.6
	1962	Hyde Park	96	.3	3.7
Taft	1962	Brighton	66.6	2.9	30.5
Edison	1962	Brighton	66.6	2.9	30.5

In analyzing these tables, the distinction between coeducational and non-coeducational schools is relevant, and also that between high schools with grades 9-12 and those with only grades 10-12. Thus it appears that students at five of the six majority white K-8 schools were fed to grade 10-12 high schools, and that the exception, Russell, was fed to South Boston, 100% white; and that students at the other schools, where whites were in the minority, were all fed to grade 9-12 type high schools. In the latter group of four K-8 schools, seat preferences were assigned only to girls graduating from three of them (since Burke and Girls high schools were for girls only), and to both boys and girls at the fourth, Dearborn. It should also be noted that the significance of a seat preference at a particular high school depends in large measure on whether the school is overcrowded or underutilized[22] — if the former,

[22] Overcrowding and underutilization are calculated by computing enrollments with the capacities of school buildings as determined by the city's Educational Planning Center.

a seat preference would be a necessity for admission; if the latter, it would be of slight significance because vacant seats could be occupied without seat preferences by students transferring under the open enrollment policy which was in effect until August 1971, as described in the next division of the opinion. By this standard, preferences were significant in the school year 1967-68 only at three district high schools — Hyde Park where there were 95 more students enrolled than the school's rated capacity, Roslindale with an excess of 121, and Brighton with an excess of 163 — and at citywide English which had a rated capacity of 1,200 students and was accommodating 2,103, an overenrollment of 903. Finally it should be noted that during the school year 1967-68, white students at English outnumbered black students by a ratio of 4:1.

A second set of feeder pattern changes was promulgated in February 1968 applicable to the school year 1968-69. Students at five K-8 schools were given additional seat preferences at English, Burke or Girls. A sixth change pertained to Michelangelo junior high and to three schools whose grade structure was new to the local scene: middle schools containing grades 6-8. The idea of pupil progression from elementary schools with grades K-5 to intermediate schools with grades 6-8 to high schools with 9-12 had caught on in other parts of the country. Its supporters claimed various educational justifications for it, e.g., the earlier maturity of teenagers, the desirability of long-range career-planning, reducing the number of "drop-outs" on the occasion of changing schools, etc. Defendants introduced this new grade progression system in Boston beginning with the 1968-69 school year. In 1967 a new school, McCormack, had opened with grades 4-8 near the Columbia Point housing project and it was designated as a middle school. Two others, Lewis and Campbell (since renamed Martin Luther King), had been junior high

schools [23] and were converted to middle schools by adding grade 6 and eliminating grade 9. The fourth was Thompson, therefore a K-8 school, whose overlapping district was shown on the first of the maps, *ante,* and which was included in the first table, *ante,* since its graduates were given seat preferences at two junior highs by feeder patterns promulgated for the 1967-68 school year. There have been no additional conversions to middle schools or openings of new ones since 1968. A third category of change in feeder patterns in 1968 was the deletion of former seat preferences for graduates of two of the new middle schools, Lewis and Campbell, and two junior highs, Lewenberg and Wilson. The various feeder patterns changes at the different types of schools, together with the racial compositions of their student bodies for the school year 1968-69, are set forth in the following tables:

K-8 Schools	W	OM	B	Schools Fed	W	OM	B
Russell	94.3	2.8	2.9	Burke	19.6	11.1	69.3
				Girls	9.6	7.8	82.6
				English*	66.1	9.7	24.2
				English	34.6	8.9	56.5
				English	72.1	3.6	24.3
Prince	47.9	14.2	37.9	Burke	(as above)		
				English	"	"	
Rice-Franklin	24.8	39.7	35.4	English	"	"	
Lincoln	20.9	50.8	28.3	English	"	"	
Martin	16	7.5	76.5	Girls	"	"	
				English	"	"	

* To alleviate overcrowding in 1968-69, the main English building contained only grades 10-12; 393 freshmen were housed at underutilized T. Roosevelt grammar school in Egleston Square, Roxbury for 1968-69 and 270 for 1969-70; some sophomores, 165, were sent to Brighton High for 1968-69 only. Hence the three sets of percentages for English, the first at the main building, the next for freshmen at T. Roosevelt, and the last for sophomores at Brighton.

[23] Lewis and Campbell were among the three junior high schools in Boston in 1967 with the highest percentages of black students in junior highs; Lewis had the highest, 99.7%, then Timilty with 98.2% and Campbell with 94.5%.

As before, in analyzing these tables the type of high school, i.e., whether 10-12 or 9-12 and coeducational, is relevant as well as the racial compositions of the K-8 and intermediate feeder schools and of the high schools fed;

Intermediate Schools	W	OM	B	Schools Fed	W	OM	B
Michelangelo	96	—	4	Charlestown	98	.5	1.5
Thompson	65.9	3	31.1	Burke	19.6	11.1	69.3
				Girls	9.6	7.8	82,6
				English*	66.1	9.7	24.2
				English	34.6	8.9	56.5
				English	72.1	3.6	24.3
McCormack	27.6	6	66.4	Burke	(as above)		
				Girls	" "		
				English	" "		
				S. Boston	98.8	.2	—
Campbell	.6	4.6	94.8	Burke	(as above)		
				Girls	" "		
				English	" "		

* Note to previous table explains three sets of figures for English.

Intermediate Schools	W	OM	B	Seat Preferences Discontinued at	W	OM	B
Wilson	91.5	.7	7.8	Hyde Park*	95.5	.6	3.9
Lewenberg	32.5	2.3	65.2	Dorchester*	72.3	1.5	26.5
Campbell	.5	4.6	94.9	Dorchester	(as above)		
Lewis**	.5	—	99.5	Jamaica Plain	55.5	4.2	40.3

* These discontinuances were partly temporary inasmuch as Wilson's preferences at Hyde Park were partially restored in 1969-70 and additionally in 1971-72; as were Lewenberg's at Dorchester in the same years. Wilson never lost its preferences at Dorchester.

** Lewis became the intermediate component of the model demonstration subsystem of which Trotter was the primary component; for two years the secondary component was at Dorchester High Annex, a separate building; in 1970-71 it went to Copley Square High, 31% white, 10% other-minority and 59% black. In leaving the main school system, Lewis also no longer fed Burke and English whose percentages are included in the previous tables.

and also the preference assigned a year earlier to all five K-8 schools. With respect to the tables showing intermediate schools, a further fact is essential to an assessment of the Michelangelo entry: since 1962 Michelangelo's graduates had had seat preferences only at English. Also the preferences assigned to graduates of the middle schools must be appraised in view of the overcrowding at English[24] and the preferences which were discontinued as well as the changing racial compositions of the feeder and fed schools. Finally it should be added that very few feeder pattern changes were made after those for 1968-69; and all changes of any consequence are described in this division of the opinion.

When the feeder pattern changes for the two school years 1967-68 and 1968-69 are considered together, it is apparent that: (a) graduates of heavily white K-8 schools — Cheverus, Russell and Parkman — were given seat preferences at heavily white coeducational high schools; (b) graduates of heavily black lower schools — Martin, Dearborn and Campbell — were given seat preferences at English for boys and Girls or Burke for girls and nowhere else; (c) graduates of lower schools having substantial white percentages who were given seat preferences at English, Girls and Burke — Prince, Thompson and McCormack — were also given options of going to predominantly white high schools either directly or indirectly by way of a predominantly white junior high; (d) when the feeder pattern changes applicable to English started to take effect, students at heavily white Michelangelo which had fed English for several years were given the option of attending heavily white Charlestown;[25] and (e) chan-

[24] English had an overenrollment of 131 students in its main building during the school year 1968-69 despite the use of two distant annexes.

[25] The administrative judge in the HEW proceedings characterized this option for Michelangelo graduates as "a discriminatory escape mechanism."

nelling of black students to English, Girls and Burke and away from the grade 10-12 type high schools was facilitated by the selection of two of the most heavily black junior high schools in the city for conversion to middle schools.

Only once did the defendants make a seat preference change tending to alleviate racial imbalance: in 1971 McCormack middle school was deleted as a feeder for English, Girls High and Burke, leaving its graduates with a seat preference only at South Boston High. However, the deletion was more in the nature of a public relations gesture than a genuine change for the following reasons: (a) by September 1971 a seat preference at English had become meaningless due to the large number of vacant seats — between the 1967-68 school year, when the Meagher feeder patterns first took effect, and the school year 1971-72, total enrollment at English had plummeted from 2,103 students to 977 students; (b) English and Girls High received students on a citywide basis anyway; and (c) South Boston was 100% white, filled to capacity, and black students were believed to be unwelcome there in 1971. Predictably, the change in the feeder patterns made no difference: South Boston continued 100% white and black graduates of McCormack continued to enroll at English, Girls High and Burke.

Another feeder pattern change effective in 1971-72 was also of minor significance: K-8 Prince's option to Taft junior high (but not to Edison junior high), which had been established in 1967, was eliminated, thereby narrowing the channel to Brighton for white students at Prince. However, in the interim enrollment at Prince had declined steadily from 324 students to 285 and the percentage of white from 51% to 40%. The remaining seat preference at Edison was probably sufficient to accommodate the smaller number of white graduates from Prince.

The only consistent basis for the feeder pattern designations, changes and deletions was the racial factor. Neither distances between schools, capacities of receiving schools, means of transportation or natural boundaries explain them. In their requests for findings, defendants offered explanations for the seat preferences established for graduates of five of the affected schools — McCormack, Parkman, Prince, Michelangelo and Thompson — but their explanations have not withstood close scrutiny. The gesture regarding McCormack has been discussed, *ante*. Defendants submitted that Parkman and Prince had seat preferences prior to 1967-68; but the pertinent testimony was simply that in prior years some students at those K-8 schools enrolled at the Irving, Edison and Taft junior highs, not that seat preferences had existed. Defendants requested a finding that "the Prince preference at the Taft was eliminated because of space limitations at the Taft. The Edison has much more space available." In fact, when the change was made, Taft was underutilized with a capacity of 540 and enrollment of 521 and Edison was overcrowded with a capacity of 786 and enrollment of 799; and a year earlier, when the Prince change was first promulgated, overcrowding at Edison was twice as severe as at Taft: an overenrollment of 56 students at Edison compared to 27 at Taft. Defendants submitted that Michelangelo graduates were given the option of attending Charlestown in 1968-69 because the tenth grade for English was then located at Brighton; however, only 165 sophomores at English were sent to Brighton, the large majority of them remaining in English's main building; moreover, the Charlestown option was undisturbed when all segments of the English tenth grade returned to the main building in 1969-70. Regarding Thompson, defendants' requests are rebutted by evidence too complex to set forth in detail; suffice it to say that they overlooked the deletions

of feeders from Lewenberg and Wilson junior highs, remaining options, and the fragmentation of the Lewenberg and Wilson districts in 1969-70 and 1971-72 into specified subdistricts.

With respect to the disproportionate impact on black students of the opening of the four middle schools and related feeder patterns, and the fact that no middle schools were opened after 1968, defendants have contended that the program of changing to a K-5, 6-8, 9-12 progression would have continued but for obstacles beyond their contriol which frustrated plans for a new 5,000 capacity campus type high school in Madison Park. However, defendants' contention is inconsistent with the following evidence: (a) the only school committee member, present or former, who testified at the trial had no recollection of any connection between plans for a K-5, 6-8, 9-12 progression and the proposed campus high at Madison Park; (b) defendants' 1966-67 racial imbalance plan discussed middle schools specifically but did not mention the campus high as part of that conversion; and (c) after the four middle schools were opened in 1968, a number of new K-6 schools were opened, rather than K-5 schools which would have been compatible with a K-5, 6-8, 9-12 system. For example, the Holland K-6 school opened in 1972; it was in the King (formerly Campbell) middle school district which was 94% black; but Holland was predominantly white and its graduates were admitted at Cleveland junior high, 91% white, despite the fact that Cleveland had a capacity of 810 and an enrollment in 1971-72 of 1,131 and King had a capacity of 1,010 and an enrollment of 837, i.e., Cleveland was overenrolled by 321 pupils and King had 173 available seats. The explanation was given in the testimony of the associate director of the city's Educational Planning Center: parents of pupils at Holland did not wish their children to go on to King. Finally, there was

always abundant space available at 9-12 grade high schools which might have accommodated ninth graders if other junior highs than Campbell (renamed King) and Lewis had been converted to middle schools. Vacant seats at Girls between 1967 and 1972 averaged in excess of 500; at Burke there were 142 vacant seats in 1969-70, 185 in 1970-71 and 141 in 1971-72; English became underutilized, with 223 vacant seats in the main building in 1971-72. The problem, of course, was that the student bodies at those schools were predominantly black. This situation, however, did not exist in East Boston, where the high school contained grades 9-12 and there was a junior high, Barnes, nearby. The student bodies at both schools between 1967 and 1972 always exceeded 97% white. Moreover, East Boston high was always underutilized, with vacancies ranging from 212 in 1967-68 to 89 in 1971-72; and the ninth grade at Barnes probably had fewer than 250 pupils. If the defendants still intended a general conversion of junior highs to middle schools, the school in East Boston would seem to have been ripe for such a change, but was never converted. In sum, the lack of the large campus high school does not explain defendants' failure to make further conversions to a middle school system. It is of course irrelevant as a justification for the discriminatory feeder patterns.

The consequence of the feeder pattern changes and discriminatory options, in combination with the opening of four middle schools, was altogether foreseeable, almost immediate, and well-understood by the defendants: a dual system of secondary education was created, one for each race. Black students generally entered high school upon completion of the eighth grade, and white students upon completion of the ninth. High school education for black students was conducted by and large in citywide schools, and for white students in district schools. White students

were generally given options enabling them to escape from predominantly black schools;[26] black students were generally without such options. The advantages and disadvantages of the introduction of middle schools were experienced almost entirely by one of the races, the black. The advantages and disadvantages of coeducation were experienced mainly by one of the races, the white. The high schools to which black students were channeled, especially English, changed in racial composition virtually overnight. During the first school year affected by the Meagher feeder patterns, 1967-68, black students at English accounted for 18.5% of the student body. In 1968-69, the entering class at English was 56.5% black and was segregated more than a mile away at Egleston Square. In 1969-70, the entering class at English was 76% black and 18.5% other-minority. During 1967-68, 1600 white students attended English; in September 1969, the number of white students enrolling as freshmen at English was 15. In the school year 1972-73 the student body at English as a whole was 81% black; and at Girls and Burke, both were over 90% black. Elsewhere, except at Dorchester where black enrollment rose from 20.6% in 1967-68 to 52% in 1971-72, increases in the percentages of black students in the student bodies of high schools were negligible.

The defendants knew what was happening. On October 15, 1970 the headmaster at English wrote to Mr. Meagher, who had become deputy superintendent, giving him the racial breakdown of the student body for the school year just begun, including 614 blacks and 542 whites, and listing

[26] The options were uniformly so exercised. Records were available in a few instances, e.g., (a) when white students at Michelangelo junior high received seat preferences at Charlestown in addition to English, every one of them chose Charlestown; (b) of 143 white students at Russell K-8 school given seat preferences at South Boston, English, Girls and Burke, 142 chose South Boston.

four sources of the problem of increasing imbalance, as follows:

"1) the assignment of core-city feeder schools in our district;

2) the relatively few seats *actually* available to boys from these feeder schools when they apply elsewhere under the open-seat plan;

3) the lack of Grade 9 seats in two of our feeder schools and also in most alternative choices of high schools;

4) the tendency of white families to react to our trend toward minority imbalance by withdrawing their sons and thus accelerating the trend;"

At a school committee meeting on March 9, 1971, feeder patterns were a subject of discussion and the following exchange occurred:

Member #1: So the fact is that the feeder schools are imbalancing the high schools, and the people won't come in because they realize that?

Superintendent: Therefore, the large city schools are becoming smaller and smaller and becoming black.

Member #1: And they are underenrolled in comparison to the others?

Superintendent: Yes.

Member #2: On the question of districts for high schools or feeder schools for high schools, that is what we face now. We have a choice. We can either at the English High School and Jeremiah Burke High School and Girls High School and perhaps Girls Trade School stay or become almost wholly Negro, the way they are now, or are becoming, or we can so redistrict as to say No, in which case we scatter those Negro youngsters into Charlestown, into East Boston, into South Boston.

Superintendent: That's right.

Member #2: Do you want that degree of hullabaloo. How are they going to get into South Boston? If you are going to keep them out of these schools, how are they going to find room in those other high schools unless the other high schools are so redistricted to their feeder schools that they have to come to English High School?

Superintendent: That's right.

Member #2: People living in the Fort Point Channel area in East Boston could be told they must go to English High School and couldn't go to East Boston High School.

Chairman: I think we had better move along.

The committee's initial fourth stage plan voted on June 15, 1971 contained the following statement:

"Traditionally large numbers of high school aged students from each residential district of Boston attended secondary school at in-town locations. However, in recent years this trend has been reversing. Numbers of secondary students have been abandoning the central schools in favor of district schools, thereby contributing to the imbalance of selected high schools."

Defendants' implementation of these feeder patterns and discriminatory options, which was equivalent to the redistricting of several high schools, occurred at a time when they were rejecting and evading state board demands that they redistrict elementary and intermediate school districts to alleviate racial imbalance. At the lower levels, maintaining the status quo, e.g., neighborhood schools and open enrollment, often served to perpetuate segregation. At the secondary school level, however, where citywide enrollment was traditional at half of the city's high schools and students routinely traveled several miles to and from school by public transportation, segregation could not be maintained without basic complex changes being made.

The defendants made such changes for the purpose of promoting racial segregation and accomplished their purpose.

IV

Open Enrollment and Controlled Transfer

The terms open enrollment and controlled transfer refer to school committee policies which permit pupils, on an individual basis and when space is available, to enroll in schools outside of their residential districts or other than those determined by pertinent feeder patterns. In 1961, when open enrollment was first adopted, it was generally thought to be an aid to integration because it enabled black students to attend predominantly white schools if the schools had vacant seats and private transportation could be arranged. It soon became evident, however, that open enrollment was also an aid to segregation because it enabled white students to transfer from schools with racial compositions not to their liking. Under the Racial Imbalance Act, Mass. G.L. c. 71, §§ 37C and 37D, the state board tried to persuade and then compel the defendants to limit open enrollment by prohibiting trasfers which increased racial imbalance. The defendants refused and for a period of about five years, 1966 to 1971, the issue was a hard bone of contention. Finally on August 23, 1971, as part of a package deal, i.e., one of the amendments to the defendants' fourth stage plan, whereby state funds which had been withheld since May 25 were released, defendants agreed to prohibit transfers which would increase racial imbalance. Plaintiffs have contended in these proceedings that the defendants' change was more apparent than real.

The segregative consequences of defendants' transfer policies, while by no means minimal, were small when compared to those by facilities utilization, districting and feeder patterns already discussed. Transfer applications are made and handled on an individual basis, whereas dis-

crimination in facilities utilization, districting and the like affect large groups of students. Also, as will be explained, the extent of segregative transfers is blurred by loose use of the phrase "racial imbalance." Nevertheless, the defendants' words and actions in determining and administering their transfer policies are especially probative on the question of their intent.

Suggestions for changes in the open enrollment policy began in June 1963 when NAACP representatives addressed a school committee meeting on a broad range of subjects. In April 1965 the Kiernan Report suggested modifications of open enrollment, including (a) preference for transfers reducing racial imbalance, (b) free transportation if beyond walking distance, (c) centralization of administration instead of principals' unsupervised discretion and (d) listings of vacant seats. In September 1965 a private group of black parents raised funds for private transportation of black pupils transferring under open enrollment to predominantly white schools. Called Operation Exodus and led by a black parent, Ellen Jackson, who testified at the trial, it bused approximately 250 black students in 1965-66 and grew steadily to approximately 1,100 in 1969-70.[27] At some of the transferee schools, the students encountered locked doors, physical segregation in separate classrooms, auditoriums and corridors and placement in the rear of classrooms. Anticipating the arrival of black students, administrators of some transferee schools had desks unbolted from the floor and removed from classrooms.

A black parent, Underwood, and Operation Exodus complained in 1969 of racial discrimination in the administration of open enrollment to the Massachusetts

[27] By 1971-72 the number had tapered off to 171, probably due to the opening of new schools in black neighborhoods and transfers to suburban schools under the METCO program.

Commission Against Discrimination (MCAD), which conducted hearings for twelve days and issued its findings on June 22, 1971. *MCAD ex rel. Underwood* v. *Boston School Committee,* No. EDXIV-1-C. The Commission concluded that open enrollment was administered with discrimination on the basis of race and color and issued a cease and desist order. It found, among other things, that (a) parents and children considering open enrollment application were given little information or help and were often misinformed or misled at the schools the children were already attending and by school department headquarters, (b) available seat-count figures were not distributed or made easily accessible to students seeking open enrollment admissions, (c) parents and students were discouraged from attempting to make applications under open enrollment by principals, administrators and guidance personnel, (d) personal interviews were used to determine the race or color of the applicants and to discourage applicants not desired by the receiving school, (e) the seat-count of available places was not based on established capacity figures and was a subjective compilation under the direction of the particular school principal not reflecting an accurate count, and (f) open enrollment was a means of effecting the transfer of students arbitrarily selected.

When the defendants refused to comply with the Commission's orders, enforcement proceedings were instituted in October 1971 in the Superior Court, Equity No. 94218, which, on April 22, 1974, affirmed the MCAD findings but remanded for a determination of mootness since the complaining student had graduated and open enrollment had been superseded by the controlled transfer policy. Specifically the court found that open enrollment had been operated in a discriminatory manner so as to hinder and in many cases exclude black and other minority students from transferring to schools that had empty seats. On May 28, 1974

an MCAD commissioner reported that (a) the proceedings are not moot, (b) under the controlled transfer system, many of the practices previously found and condemned continue to exist, and (c) the school committee has not eliminated the discrimination that existed in the open enrollment system.

For a brief, ten-day period in June 1966, the open enrollment policy was amended to prohibit transfers aggravating racial imbalance. The background was as follows: in February 1966 the board rejected the defendants' 1965 racial imbalance plan and made several proposals including changes in open enrollment. On April 12, 1966 the board voted to withhold state funds from the Boston schools. At a committee meeting on June 13, the chairman moved that the open enrollment policy be amended as follows: no pupil may be permitted to attend a school out of district if his attendance in that school will either cause said school to become racially imbalanced or aggravate an already existing condition of racial imbalance in such school. In support of his motion, the chairman stated,

> If years ago we recognized that there was merit to the proposition [that a segregated education is educationally harmful] and took steps to withhold this privilege of open enrollment, today I don't believe the Patrick T. Campbell would be an imbalanced school. I don't think that the Solomon Lewenberg would be approaching an imbalanced state.
>
> In other words, we could have avoided the difficulties that we now face. And I think it's reasonable to predict that if we don't adopt some kind of order such as this we are going to have more imbalanced schools creating more problems to be attacking in the future.
>
> This seems to me to be the kind of preventive step we should take now while there is still an opportunity to take preventive action.

A dissenting member responded,

> Mr. Chairman, I think it is wrong to take away this right, and I don't call it a privilege. It is absolutely a right that has been given to the people of the City of Boston in the form of open seat enrollment.

The motion passed 3-2. However, the state board would not retract its disapproval of the defendants' 1965 plan. Therefore at the committee's next meeting on June 22, one of the June 13 majority moved to rescind, explaining that the state funds had not been released and also that he now believed that the amendment limiting transfers was an unconstitutional discrimination against white students. The latter point was endorsed by the superintendent who said that he believed that "our open enrollment policy is the finest open enrollment policy of any school system in America." [28] Rescission was voted by 3-2. Every year thereafter until 1971, similar amendments to open enrollment were proposed and rejected.

The basis of the defendants' resistance to curtailment of open enrollment was crystal clear: it would deprive white students of their "right to escape" from schools with substantial percentages of black students. By 1970 the member who had switched his vote at the June 22, 1966 meeting had been elected by his colleagues as chairman of the school committee. On the same issue at a January 20, 1970 meeting, he stated the same position he and other members had often explained at previous meetings, as follows,

> Of course the thing that would have everyone deeply concerned would be again a school like the Lewenberg which starts to become evenly balanced or has become so and the white youngsters start to apply under open

[28] Taking pride in the transfer policy became a refrain for members at subsequent school committee meetings, e.g., November 24, 1970, "Boston's open enrollment policy as presently constituted is the democratic way. It's the American way. It's what we call freedom of choice."

enrollment to move out, and under this they would be pretty much chained to their seats. They wouldn't be allowed to move.

The defendants' ultimate decision in August 1971 to adopt a controlled transfer policy was made upon consideration of a staff memorandum dated July 9, 1971 outlining available options and describing open enrollment as "Parental choice, as to school attendance, *historically granted to families in changing neighborhoods.*" (Emphasis added.)

Open enrollment did not die without a struggle. On October 27, 1970, the state board voted unanimously to modify the open enrollment policy as follows:

1. Children may enroll in a school other than that of their assignment, on a space-grade available basis, if, and only if, such enrollment decreases racial imbalance (as defined in the Act) in his school of regular assignment, and/or in the selected school;

2. Exceptions to the foregoing policy may be made only with respect to schools that offer specialized courses or curricula that are not otherwise available to eligible students; individual exceptions to the foregoing policy may be granted by the School Department upon the basis of a written showing of hardship by the parents of the student-applicant;

3. The foregoing modifications shall be operative for the school year 1971-72, and to that end the Title IV, Equal Educational Opportunities Bureau of this Department is directed to provide forthwith to local School Committees and Departments such technical assistance as may be necessary to ensure implementation of this requirement.

At the committee's next meeting, defendants voted to invite State Commissioner Sullivan to attend a meeting of the committee on November 23 "so that he can try to justify his position." The Commissioner appeared and gave a com-

prehensive justification of the board's action, stating in part that it was based upon the unanimous conclusion of the courts that no plan which involves parental or student choice of schools is permissible where it results in racial separation of white and Negro pupils; and that the Constitution does not permit school officials to facilitate racial separation of pupils. The defendants' response was a vote at a meeting the next day to sue the state board and seek a declaratory judgment that the board's vote of October 27 was itself unconstitutional. Suit was never instituted. On March 31, 1971, the commissioner requested assurances from the committee by April 16 that open enrollment would be eliminated. When such assurances were not forthcoming, the board on May 25 notified the appropriate state officers to withhold funds otherwise payable to the Boston school department. On June 15 the defendants submitted their fourth stage plan to the board without any modification of the open enrollment policy. On June 16 the board extended its May 25 withholding of funds and on June 22 it rejected the fourth stage plan. On July 12 the committee amended its plan but left the open enrollment policy intact. On July 20 the board rejected the amendments. On August 16 the committee amended its plan a second time, again leaving open enrollment intact. On August 17 the board voted a resolution requiring that open enrollment be eliminated. Finally, on August 23, the committee yielded, or at least seemed to.

During 1970-71, over 6,700 pupils were attending out-of-district schools under open enrollment, and at least 1,028 of these transfers were segregative: 324 non-white pupils transferred from majority white to majority non-white schools and 704 white pupils transferred from majority non-white to majority white schools. Beyond that, however, the extent of racial segregation caused by open enrollment in 1970-71 is impossible to pinpoint. During the same year,

1,546 white students transferred from one majority white school to another; and 1,660 black students transferred from one majority black school to another. But how many of these transfers were segregative cannot be determined on the basis of the evidence received at the trial. Part of the difficulty lies in the definition of racial imbalance in § 37D of the Act: when the per cent of non-white students in any public school is in excess of fifty per cent of the total number of students in such school.[29] Thus racial imbalance is quite different from racial segregation. Suppose, for example, a two-school district with an equal number of white and black grammar school students in which all black pupils are assigned to school A and all white pupils are assigned to school B. Both schools would be segregated but only school A would be imbalanced. Yet often the terms were used interchangeably, as illustrated by the following discussion at a committee meeting on October 19, 1971 regarding proposed expansion of a secondary school facility:

> Chairman: The important thing is that they need an addition out there at South Boston High. Who is going to fill it is a decision that is going to be made later. But we don't want to stop progress as far as planning for the addition is concerned. Do you follow me?
>
> Member #1: I follow you, but to be realistic about it, I don't think the people in South Boston are going to want to have a racially balanced school.
>
> Member #2: The people in South Boston have a racially balanced school.
>
> . . . .
>
> Chairman: To go forward on the addition to South Boston High.

[29] The same section also provides, "The term 'racial imbalance' refers to a ratio between non-white and other students in public schools which is sharply out of balance with the racial composition of the society in which non-white children study, serve and work.

Member #1: It would have to be racially balanced.

Chairman: Racially balanced could mean a hundred per cent white.

Member #1: I don't think it would under Commissioner Sullivan.

Member #2: Of course not.

Member #1: Mr. Sullivan is committed to the numbers game, black and white—no question in my mind about that.

Mr. Hambelton (associate superintendent): If we discussed this with the state and we do not show them how the school can be balanced or integrated, they will not fund it and that will end the project right then and there.

Although there was relatively little direct evidence as to the segregative effects of open enrollment, they were cumulative and probably substantial. Transfers under open enrollment were virtually permanent; they did not have to be renewed annually and they qualified transferred students for the feeder patterns applicable to graduates of the transferee schools. At school committee meetings during the period from 1966 to 1971, several members spoke of Lewenberg junior high as having become predominantly black because of open enrollment; and individual members made the same statement about other schools, e.g., Holmes and Campbell junior highs and Prince elementary school. In sum, open enrollment as administered by the defendants became a device for separating the races and contributed significantly to the establishment of a dual school system.

The segregative effects of open enrollment were by no means remedied by the new controlled transfer policy because of its numerous exceptions, the most significant of which was a "grandfather clause" whereby "any student who last year attended an out-of-district school under the Open Enrollment Policy may continue to attend such school,

so long as a seat remains available." At the trial defendants sought to defend the grandfather clause on the grounds that it helped perpetuate transfers promoting integration and avoided disrupting friendships that had formed among students. The first ground is specious since transfers promoting racial balance would have been allowed anyway under the controlled transfer policy. As for preserving friendships, the record does not enable the court to discern why the defendants thought this social interest so important. There was no showing that pupils with friends in their out-of-district schools could not have made new friends in their in-district schools or that many of their friends would not also have been returned with them to the schools whence they came. A major consequence of the grandfather clause was to restrict severely the balancing potential of the new policy because nearly all otherwise available seats out-of-district were already occupied by transferees under open enrollment. The total number of transfers at all levels of schools under the new policy in 1971-72 was only 319.

The second exception to the controlled transfer policy came in the form of an interpretation of the grandfather clause by the superintendent with the approval of the school committee. Under date of August 23, 1971 the superintendent issued an explanatory circular including what were called "other considerations", as follows:

> 1. All students presently attending out-of-district schools under the former Open Enrollment Policy *may continue* to do so.
>
> 2. No *new* transfers may be effected under the discontinued Open Enrollment Policy.
>
> 3. Those pupils who avail themselves of their options under this Controlled Transfer Policy beginning in September 1971 shall be required to re-apply for their seat on an annual basis.
>
> Continuation shall be denied only in the case where

increased attendance by pupils living within the district shall have produced a situation of extreme overcrowding.

4. Special educational needs and other "hardship" cases should be decided on a case-to-case basis by the Assistant Superintendent of the home district.

The fine point lay in the second consideration which embodied the superintendent's view that the grandfather exception applied not only to students attending out-of-district schools under open enrollment during 1970-71 but also students who in May 1971 had filed applications for transfers which would begin during September 1971. Such transfers would not be deemed "new" because *applied for* before the termination of the open enrollment policy. This construction of the grandfather clause was, to say the least, difficult to understand, so during the committee meeting on September 7, 1971 the defendants went into executive session in order that the superintendent might explain the situation in private. After his initial explanation, the superntendent said, "I would hope that my circular would stand. I don't think anybody will notice it but ourselves." When the associate superintendent said later during the executive session that he would agree with the superintendent's interpretation "if the State understands it the same way", the superintendent replied, "To my point of view, the State isn't going to find out about it until it's too late." Standing alone, the superintendent's cynical comments might be discounted due to the strain and pressure of the moment—school was scheduled to open the next day, parental furore over the districting for the new Lee school was rising, etc. But their significance may not be so minimized. They must be considered together with similar remarks by committee members at previous meetings and their frequent expressions of disdain for the state board of education and state officials responsible for enforcing the

Racial Imbalance Act. In that context the superintendent's remarks accurately reflected the bad faith which characterized many of the school committee's dealings with state officials.

A third exception to the controlled transfer policy covered transfers between schools in multi-school elementary districts. As seen *ante,* several elementary districts contain more than one school and they vary greatly in racial composition, e.g., the Marshall district, in which the Marshall and Champlain schools are within a half mile of each other and the student body of the former, in 1971-72, was 59% white and the latter 94% black. The board complained that this exception did not correspond to its understanding of the new policy which provided that, "Before October 15, a student can only transfer from a *school* in which his race is in a majority to a *school* in which his race is in a minority." (Emphasis added.) The superintendent replied that the board should have understood all along that there would be such an exception. It remained in effect and allowed intra-district segregative transfers to continue.

A fourth exception may be called, for lack of a better term, "group exceptions" voted by the school committee. One, already described, permitted 200 black students to remain in Lee school although they did not reside within its district. Constituting approximately one-fourth of Lee school's population, this contributed heavily to Lee's opening with a 74% black enrollment. A related, extraordinary group exception—never voted, however, by the school committee—flowed from the option given in September 1971 to students encompassed by the new Lee district who had been attending Fifield, 82% white, and O'Hearn, 99% white, schools: although residents of the new Lee district, they were permitted to continue in attendance at Fifield and O'Hearn. At the trial it was established that the same option has been continuously granted to the original beneficaries' younger

brothers and sisters as they have entered the school system.[30] Another group exception allowed 14 white Chittick graduates to avoid their district junior high, Lewenberg, which is 95% black. The asserted basis was safety because of a high crime rate in the neighborhood, but the same crime rate had to be endured by black students attending Lewenberg.

A fifth exception to the controlled transfer policy was "hardship transfers", presumably granted only on "the basis of a written showing of hardship by the parents of the student-applicant." However, hardship transfers were regarded and administered merely as a loophole and were explicitly referred to by school committee members as an "escape clause" and "a big out." Sometimes these transfers were granted on explicit racial grounds and at others without any showing of hardship at all. The total number of hardship exceptions was small, 118 during 1971-72, yet hardly *de minimis* when compared to the total number of racially balancing transfers during the same period, 319.

Viewed together, the open enrollment and controlled transfer policies were managed under the direction of the defendants with a singular intention to discriminate on the basis of race. For open enrollment and evasion of controlled transfer restrictions were antithetical to the defendants' foremost publicized policy to have each pupil attend the school serving his neighborhood community.[31] The court has already found that the "neighborhood school" policy was

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[30] Whether qualification for this group exception involves a showing of blood relationship, or extends also to all pupils residing on streets where the original beneficiaries lived, was left uncertain at the trial, despite the court's request of defense counsel for clarification.

[31] The "neighborhood school" policy has existed in Boston more in theory than in practice. At least 30,000 students currently use public transportation; students walk substantial distances to school, e.g., fourth graders up to three-quarters of a mile; high schools enroll students on a citywide basis; elementary districts may, on the one hand, include several neighborhoods or, on the other, split them up.

no impediment to segregative districting, redistricting, use of facilities and feeder patterns. So here, when a neighborhood started to change from predominantly white to black, the "neighborhood school" policy was subordinated to the white students' presumed right to escape to safely white out-of-district schools. The result of the defendants maneuvering was to encourage and facilitate the abandonment by white students and parents of schools which appeared to be in the process of becoming predominantly nonwhite.

V

Faculty and Staff

Plaintiffs' claims in this area, unlike those heretofore discussed concern policies of the defendants which discriminated against them indirectly—but no less significantly.[32] Another distinction is that the racial composition of neighborhoods, segregation in housing, distances to schools and safety precautions are irrelevant here. See, e.g., *Kelly* v. *Guinn*, 9 Cir. 1972, 456 F.2d 100, 107. Except for substitutes called in on short notice, teachers are not assigned on the basis of residence. Plaintiffs' principal claim involving faculty and staff is that the defendants have knowingly pursued policies resulting in racial segregation of teachers and administrative personnel, thereby reinforcing the racial identifiability of schools and increasing the racial segregation of students. Plaintiffs' next claim under this heading raises a further distinction in that it does not depend on the *Brown* and *Keyes* and other school cases decided by the

[32] A school committee's policy and practice with regard to faculty and staff are "among the most important indicia of a segregated system. Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff . . . a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." *Swann* v. *Charlotte Mecklenburg Board of Education*, 1971, 402 U.S. 1, 18.

Supreme Court in the past two decades, but on traditional equal protection principles. See *Sweatt* v. *Painter*, 1950, 339 U.S. 629. Specifically, plaintiffs assert a denial of equal educational opportunity, viz., that defendants have knowingly pursued policies resulting in less qualified, less experienced and lower paid teachers in predominantly black schools. A third claim is that defendants have violated the constitutional right of public school students to have the school system operated free of racial discrimination in the recruiting, employment and promotion of teachers and staff. See *Johnson* v. *San Francisco Unified School District*, N.D. Cal. 1971, 339 F.Supp. 1315, 1332. We find that plaintiffs have established all three claims.

A general introductory description of certain aspects of teacher employment, classification and transfer will help to clarify discussion of this group of plaintiffs' claims. Probably typically, the Boston school system has always been structured in a way which would impede participation by outsiders generally. The vast majority of teachers have been products of local colleges and universities, especially Boston State Teachers College. New teachers were appointed from eligibility lists compiled on the basis of the Boston Teachers Examination (BTE), a special essay type test given only in Boston. The only means of qualifying for nearly all administrative positions was to serve as a teacher in Boston for several years. As thought to be required by Massachusetts law, Mass. G.L. c. 151B, § 4(3), the system was colorblind, i.e., there was no reference to race on application, transfer or promotion forms or in a teacher's file. In recent years many changes have been made. The teachers union, Local 66, AFT-AFL-CIO, and the school committee entered into a collective bargaining agreement in 1966. The BTE was replaced mainly in 1968 and entirely in 1970 by the National Teachers Examination (NTE) prepared by the Educational Testing Service (ETS) of Princeton, New

Jersey. Several programs were started as a result of Title I of the federal Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. §§ 241a-244, including the model demonstration subsystem, elementary enrichment, and work-study. Sixty black recruits for provisional teaching positions were trained in a program federally funded under the Education Professions Development Act, 20 U.S.C. § 1071 et seq. However, organization and practices of the system remain much the same, e.g., the complex provisions in the union contract covering teacher transfers, at appendix C thereof, set forth procedures and criteria employed since 1951.

Three categories of teachers are employed in Boston, permanent, provisional and temporary substitute. Mass. G.L. c. 71, § 38G provides,

> "No person shall be eligible for employment by a school committee as a teacher, . . . unless he has been granted a certificate by the board; . . . and provided, further, that a school committee may upon its request be exempt from the requirements of this section by the department for any one school year when compliance therewith would in the opinion of the department constitute a great hardship in the securing of teachers for the schools of a town. This section shall not apply to trade, vocational, [and] temporary substitute teachers . . . ."

Permanent teachers have obtained certificates from the state board which requires a bachelor's degree from an accredited college and courses of study and semester hours therein as established by the board. Permanent teachers have various rights under state statutes and the union contract.

Provisional teachers are full-time teachers who have college degrees but lack state certificates, presumably because they haven't taken courses in education prescribed by the board. Also, they may not have taken the NTE examina-

tion or have done poorly on it. They receive one-year contracts pursuant to the exemption in § 38G for which Boston evidently qualifies each year by showing "a great hardship in the securing of teachers", although there is an oversupply of applicants for permanent positions to such an extent that on the major eligible lists the ratio of teacher applicants to positions is approximately 10 to 1. Approximately 700 or nearly 15% of the city's full-time teachers are provisionals. They are hired to fill vacancies which are not permanent and when there are no candidates on a particular sublist of the eligible list and, beginning in 1971, for purposes of minority recruitment. A provisional teacher may become a so-called permanent provisional by serving for three consecutive years, after which he acquires tenure under Mass. G.L. c. 71, § 41. Provisionals are compensated at a substantially lower rate than teachers with certificates: in the first year of employment, $1500 less and in the third year, $2100 less. Provisionals have no rights of transfer or promotion.

A third category of teachers are temporary substitutes who fill in for ill or absent teachers on a day-to-day basis and whose compensation is at a rate lower than that of provisionals. There are also a large number of practice teachers still in college and teachers' aides of one sort or another, usually hired under federal programs.

Vacancies in teaching positions and in building level administrative positions are filled first by transfers within the system on the basis of seniority. The seniority criterion has been employed in effecting transfers since 1951 and since 1966 has been included in the collective bargaining agreement between the defendants and the teachers union. The necessary conditions for a transfer are that a faculty member be a permanent teacher and have taught in that capacity for at least the two previous years in a Boston public school. Given an opening for which he or she is qualified and sufficient seniority, a permanent teacher may transfer

every two years. The procedure is as follows: by means of superintendent's circulars issued twice a year, permanent teachers are notified of the conditions of their right to transfer and of the availability of request forms; there are spaces on the transfer request form for five choices of school districts or sections of the city to which the applicant wishes to be transferred; the forms are filed with the personnel department which compiles lists of requested transfers, ranking the requesting teachers according to seniority which is measured by years of permanent teaching employment in the Boston public school system from date of employment; when vacancies in permanent positions are about to occur, principals and headmasters notify the personnel department on Request for Permanent Teacher forms and the vacancies are filled on the basis of seniority from the transfer lists. A teacher may refuse an offered transfer which he has requested, but if he does so he may not transfer until the following year.

Transfers are made only in accordance with the procedure described. Technically the right of permanent teachers to transfer is subject to denial for the good of the system, but a transfer has evidently never been denied on that ground, at least never on the ground that it would increase racial imbalance. The superintendent also has power to make transfers for the good of the service; the following provision is included in every individual teacher employment contract:

> "It is understood that the School Committee of the City of Boston reserves the right to transfer or assign a teacher from one school, district, department, position, grade or subject to another as the interests of the Boston Public Schools demand."

But this power has never been exercised.

If a vacancy in a permanent position is not filled by a transferring teacher, it is normally filled by hiring a certi-

fied teacher from an eligible list of applicants who have successfully finished the screening process for hiring new permanent teachers. Applicants are listed in the order of the score they achieved in the screening process, which takes into account grades on the NTE examination, an interview and credentials such as graduate study and experience. Assignments to particular schools are frequently made on the basis of requests by headmasters and principals. Occasionally, when no certified applicant is available, permanent positions are filled by provisional teachers. At elementary and intermediate levels, transfers and appointments are made to districts, not schools, permitting the principal of a multi-school elementary district to assign teachers to schools within his district at his discretion.

Vacancies in building level administrative positions not filled by transfers, and central administrative positions, are filled by promotions. Boston's promotion system was suspended in the spring of 1971 and vacancies since then have been filled on an acting basis. Before 1971 from four to six years of experience were required to qualify for promotion. Candidates for promotion applied to the board of examiners, which issued promotion certificates on the basis of written examinations and interviews. Persons qualifying for promotion were placed on a "rated list" compiled for each type of position, e.g., headmaster, assistant principal, etc. Such lists were drawn up only every third year. Administrative positions of assistant superintendent and above are not filled by rating, but by the superintendent's selection and school committee approval.

Racial Segregation

Black teachers are segregated in black schools. In 1972-73 there were majority black enrollment at 59 of the city's 201 schools. Of the total of 356 black teachers, permanent and provisional, 244 were stationed at those 59 schools. The percentages of the total number of black teachers in the

system who were teaching at majority black schools during the five previous years follow:

1967-68	67%
68-69	68%
69-70	70%
70-71	72%
71-72	74%

A rough understatement of the situation is that less than one-third of the schools are majority black, but over two-thirds of the black teachers are sent to them.

Whatever the angle from which a view is taken, the picture is the same. In 1971-72 [33] the defendants hired 82 black teachers, permanent and provisional, for the first time. Of this total approximately three-quarters, precisely 61, were assigned to teach at that fraction of the city's schools, less than one-third, which were majority black. Exactly half of the new black teachers were assigned to seven schools whose enrollments were over 90% black: Champlain, Higginson, Holmes, King, Lewenberg, Paine and Timilty. In 1971-72 there were 158 elementary schools in the system and 167 black teachers were assigned to them. However, three or more black teachers were assigned to the following 18 schools, whose total enrollments and numbers of white pupils and percentages of white pupils of the total enrollments are also listed:

Elementary Schools	*Black Teachers*	*White Students*	*Total Students*	*White % of Total*
Bacon*	4	2	199	1%
Baker	5	9	466	2
Dearborn*	9	5	456	1
Dickerman*	7	0	311	0

[33] This is the latest year for which the parties submitted information of this kind. Occasionally, in previous portions of the opinion, 1971-72 figures were used rather than 1972-73 because maps and charts had been prepared by the parties before the later figures became available. Also, whenever unqualified in this section of the opinion, "teachers" includes both permanent and provisional.

Ellis	3	6	600	1
Emerson	4	59	333	18
Fenwick	3	12	317	4
Garrison	3	4	904	.4
Gibson	8	25	589	4
Greenwood	5	13	800	1.6
Hale	4	5	286	1.7
Howe*	6	4	422	1
Hurley	3	23	464	4.9
Lee	6	229	1089	21
Marshall	8	699	1185	59
Mason	3	72	261	28
Paine	7	25	795	3
Perkins	3	1	125	.8

Lee and Marshall might well be eliminated from the table, since Lee was so special a situation and Marshall is a new so-called magnet school. Of the remaining 16 schools to which three or more black teachers were assigned, only Emerson and Mason had student enrollments as high as 5% white. Fourteen elementary schools with three or more black teachers on their faculties had student enrollments in which white students comprised less than 5%. In nine such schools there were fewer than ten white pupils in the entire school. In four (marked with an asterisk), white pupils were outnumbered by black teachers. On the other hand, as of 1972-73 no black classroom teacher, permanent or provisional, had *ever* been assigned to 81 of Boston's 201 schools; and an additional 35 schools have had only one black teacher in any year since 1967-68, the earliest year for which figures were put in evidence.

Black administrators are also segregated. In 1972-73 all five black principals were at majority black schools, as follows: Emerson, 66% black; Lewis, 72%; Tileston, 72% King, 95%; and Timilty, 97%. There were fourteen black assistant principals and assistant headmasters and all were assigned to majority black schools, as follows: Trotter, 53% black; English, 81%; Burke, 91%; Champlain, 93%; and Timilty, 97%. Black temporary teachers are also segre-

gated, partly because a proper factor in their selection is proximity of the teacher's residence to the school needing a day-to-day substitute on short notice. Another reason, however, is that index cards of blacks desiring substitute work often include the names of either of two minority recruiters and this is used by the personnel department to match the substitute's race with the requesting school's racial composition. Figures as to substitutes were not put in evidence.

Racial segregation of full-time faculty and staff has been attributable first to requests by principals and headmasters that black teachers be assigned to their districts. Such racial requests are received from ten to fifteen district principals a year and are honored by the personnel department whenever possible. Senior school administrators and the defendants were well aware of this practice. The second cause was the tendency of permanent teachers who had taught at majority black schools for at least two years to exercise their transfer prerogative to transfer to majority white schools. In 1971 and 1972, a total of 100 such requests were made and 39 were granted. In the same period, only two requests for transfers from majority white to majority black schools were made, and neither was granted. In the same period there was but one transfer from an elementary school with a lower percent of black pupils to an elementary school with a higher percent—it was from a school with a black enrollment of 50-60% to one with 80-90%. There was no educational justification for these transfers, i.e., there was no particular need for more experienced teachers in the receiving schools. These facts are related to the practice of filling permanent vacancies by transfer before new appointments and the current oversupply of teachers. Candidates who are not near the top of the eligible list may find that their only chance to enter the system is to start teaching in a predominantly black school; then after two years

they will request a transfer. This situation was well known to senior administrators and the defendants; assistant superintendent Griffith, testifying on deposition about a meeting of the board of superintendents, said,

> "That there should be some policy of retaining teachers. Because, as we see it, it is easier for a person to gain access into the school system by coming in through a troubled school. If you look at the top of a list and you have very, very high scores—I'll not say nine out of ten times, but a goodly degree of these people will refuse appointments to troubled schools. So the teacher that wants to get in the system will take the troubled school, knowing that in two years they can move out."

The pattern of faculty transfer from black to white schools in Boston was mentioned in the study report of the federal Civil Rights Commission filed in 1966; and the subject was discussed at several school committee meetings. Lastly, over one-third of the black teachers, 125 of 356, are provisional teachers with no transfer rights; and black permanent teachers generally have less seniority than most white permanent teachers. The transfer system's exclusive reliance on seniority thus effectively locks many black teachers in the schools to which they are initially assigned, usually majority blacks, and allows white teachers with seniority to transfer from these same schools to others.

Defendants have argued that assignment of black teachers to predominantly black schools is educationally justifiable because black teachers serve as adult role models and inspirational examples to black pupils. The record, however, is barren of evidence supporting the argument. One witness, associate superintendent Leftwich, testified that a need by black youngsters for adult role models would in his opinion be a logical explanation for granting requests of black teachers for assignments to predominantly black schools.

But his was concededly a curbstone opinion unsupported by any study or empirical data. The defendants never made any systematic inquiry concerning whether assigning black teachers to black schools inspires the confidence, or coincides with the wishes of, the black community. More importantly, there was no evidence that such considerations in fact played any part in the frequent matching of the races of teachers and pupils.

Defendants also contended that racial matching, when requested by black teachers, would have educational value because such teachers would likely be especially dedicated to the training and progress of black pupils. The first difficulty with this contention is the paucity of supporting evidence. The only evidence in the entire record that black teachers requested assignments to black schools had to do with two groups of black provisional recruits trained under the Education Profession Development Act (EPDA), 20 during the summer of 1971 and 40 in the summer of 1972. Assistant superintendent Griffith, who is in charge of minority recruitment, testified on deposition that the 1972 group of 40 "by and large preferred placement in black schools" and that the personnel department attempted to go along with their thinking and place them in the black schools. But there was no evidence that the black recruits actually requested such assignments. Surely the legislative intent of Congress in passing the federal Act was not to segregate black teachers in black schools. The defendants have never inquired of black teachers generally about the kind or degree of their commitment, if any, to teach in black schools. More fundamentally, even if defendants had done so, and black teachers requested assignments to black schools, this would not overcome the prohibition of the Fourteenth Amendment which bans intentional racial segregation in public schools whatever may be the desires of black teachers or parents. *Cooper* v. *Aaron*, 1958, 358 U.S.

1; *Booker* v. *Special School District No. 1,* D. Minn. 1972, 351 F.Supp. 799, 809.

Unequal Education

The gist of plaintiffs' claim here is that the defendants' practices heretofore described result in predominantly black schools being staffed with less qualified and experienced teachers and with everchanging faculties, all to the detriment of black pupils who generally are receiving an education unequal to that being given white pupils. This claim is not geared to the racial composition of the faculty and staff at predominantly black schools but to the quality of education available to students attending them. The facts support plaintiffs' claim.

Uncertified, provisional teachers, of whom there were 585 in the system in 1971-72 and 690 in 1972-73, are found in much greater numbers in predominantly black schools than in predominantly white schools. Statistics were compiled for 1970-71 and 1971-72 and a clear pattern but with minor exceptions emerges in both years: the blacker the school, the larger the percent of provisional teachers. The following table shows the distribution of provisional teachers as related to the racial composition of elementary schools in 1971-72 but is representative of percentages at schools at all levels in that year and in 1970-71:

% Black Students	*Number of Provisionals*	*% Permanent Teachers*
90 - 100% 24 schools	106	78.1%
80 - 90% 9 schools	34	74.6%
70 - 80% 5 schools	15	84.8%
60 - 70% 4 schools	19	85.7%

50 - 60% 4 schools	12	85.9%
40 - 50% 6 schools	25	79.2%
30 - 40% 9 schools	31	81.2%
20 - 30% 4 schools	14	82.9%
10 - 20% 14 schools	19	91.0%
0 - 10% 78 schools	60	94.6%

Note that schools above 80% black enollment had an average of more than four provisional teachers per school; and that schools under 20% black enrollment had an average of less than one provisional teacher per school. A similar pattern emerges when one calculates the years of teachers' service in the Boston school system in relation to the racial composition of the schools to which they are assigned. This was done for elementary schools in 1970-71, with the following results:

% Black Students	*Average Years in Boston Schools*
90 - 100%	5.67
80 - 90%	5.02
70 - 80%	7.26
60 - 70%	6.40
50 - 60%	7.74
40 - 50%	8.95
30 - 40%	8.52
20 - 30%	11.33
10 - 20%	10.20
0 - 10%	13.53

This table is consistent with the previous one; it also suggests that the system may channel teachers into progressively whiter schools as their seniority increases until they arrive and remain at schools less than 30% black.

Provisional teachers are not merely novices, but novices whose lack of qualifications and training necessitate their exemption from the provision of state law, Mass. G.L. c. 71, § 38G, that "No person shall be eligible for employment by a school committee as a teacher . . . unless he has been granted a certificate by the board." They may be given one-year contracts without even having taken the NTE or other standard examination which tests their subject matter competence. Of course it is possible, as argued by defense counsel, that a particular provisional may be a better teacher than one who has taken the usual courses in education and has received a creditable score on the NTE and when interviewed has compared favorably with other applicants for appointment. But the odds are against it. Generally, it cannot be doubted that the professional qualifications and skills of provisionals are inferior to those of permanent appointees. They are paid lower salaries, have slim prospects of permanent appointment and no prospects of promotion or transfer and generally lack the stature of newly appointed permanent teachers.

As in any calling, experienced practitioners are ordinarily more effective than novices, regardless of certification. The expert witness for the defendants so testified. A highly capable principal who was selected to head Lee school, Miss Frances Kelly, testified,

> "I wouldn't want to see a school, any school, with too high a percentage of firt-year teachers in it, because the first-year teacher does need helping hands from experienced ones around him and if you have too many first-year teachers in a building, percentage-wise, then the experienced teachers can't keep up with their errors and the thing becomes very unmanageable."

The need for more experienced teachers in black schools was discussed at school committee meetings on several

occasions; sometimes it was referred to as an "experince imbalance." At a meeting on March 10, 1970, a member stated,

> "These are the schools where we should have teachers who have much experience. Our most experienced teachers are needed there. The fact of the matter is that the inner city schools have a far greater proportion of first year, second year, and third year teachers."

Problems attributable to teacher inexperience in black schools were known to senior administrators as well as to the defendants.

The combination of a disproportionate number of provisional teachers at black schools and the right of permanent teachers to transfer after serving at a school for two years visited another inequality upon black students, viz., a rate of teacher turnover higher than at predominantly white schools, referred to sometimes as staff instability. This subject was discussed at several school committee meetings. On March 28, 1972, for example, the chairman of the parents' advisory board at Lewenberg junior high, then 95% black, addressed the committee regarding the poor performance of students there on city-wide tests, as follows,

> "Our main concern is the low level of student output at Lewenberg Junior High School. Our children exhibit low skill levels in arithmetic and reading.
>
> . . . .
>
> The first issue I shall speak on is the issue of staffing. Our position is that you take action to stabilize the staff. Today most staff members at the school are new to it and to teaching. In fact, many members of the staff are provisional teachers, and, therefore, have no chance to become permanently appointed to the building."

The defendants and senior administrators were aware that the high rate of teacher turnover at predominantly black schools was educationally harmful. Associate superintendent Leftwich testified, "The high rate of turnover, there is no question in my mind, is a bad thing and needs to be addressed in terms of remedy."

Therefore the court finds, as requested by plaintiffs, that teacher resources in Boston have been disproportionately allocated on a systematic basis and this distribution operates to deny black students an equal educational opportunity. *Hobson* v. *Hansen,* D. D.C. 1971, 327 F.Supp. 844; *Spangler* v. *Pasedena City Board of Education,* C.D. Cal. 1970, 311 F.Supp. 501, 514-15, 524; and *Johnson* v. *San Francisco Unified School District , supra,* at 1318, where the court stated,

> "The law is settled that school authorities violate the Constitution by assigning . . . teachers of limited experience to 'black' schools while assigning few, if any, such teachers to 'white schools.' "

Hiring and Promotion

For 1972-73, there were 4243 permanent teachers in the Boston school system, of whom 231, or 5.4%, were black. A state professional staff survey for 1970-71, the only year as to which such a survey was offered in evidence, gave a racial breakdown of the various administrative positions in the Boston school system for that school year, as follows:

Position	*Whites*	*Blacks*
Principal and Headmaster	76	3
Assistant Principal and Assistant Headmaster	194	11
Director of Department and Manager	27	0
Assistant Director of Department and Assistant Manager	49	2
Supervisor and Consultant	29	2

Attendance Supervisor (Truant Officer)	46	0
Psychologists	28	0
Teachers Assigned to Home Bound Instruction	42	0
TOTAL	491	18

Blacks filled approximately 3.5% of the positions. These percentages may be contrasted with those of black students in the system, approximately 33%, and of the city's black population, approximately 16%.[34] Plaintiffs contend that the disparity is due to racially discriminatory hiring and promotion practices knowingly followed by the defendants, and hence violative of plaintiffs' rights under the Fourteenth Amendment.

Plaintiffs' complaint concerning hiring practices rests largely upon defendants' misuse of the National Teachers Examination (NTE). It is based upon legal principles discussed comprehensively in *Castro* v. *Beecher*, 1 Cir. 1972, 459 F.2d 725. Permanent teachers in Boston are selected from eligible lists and offered positions in the order of their ranking which is determined by scores comprised of three components: the results of an examination, a personal interview, and credentials such as previous teaching ratings and years of experience. Until 1968 all applicants took an essay examination prepared by the school system's board of examiners. Known as the Boston Teachers Examination (BTE), the examination was never formally validated, i.e., determined to be significantly related to the capacity of applicants to become good teachers. From 1968 until 1970 applicants were allowed to take in-

[34] This disparity is probably due to (1) the relatively younger mean age of Boston's black population and (2) the larger proportion of white students enrolled in private schools, including roughly 30,000 in parochial schools, which associate superintendent for planning Leftwich estimated to have enrollments averaging between 75% and 80% white students.

stead the Teaching Area Examination of the National Teacher Examinations (NTE), which is prepared by the Educational Testing Service (ETS) of Princeton, New Jersey, and administered throughout the country. In 1970 the BTE was discontinued. At the time of the switch the board of examiners, which is responsible for hiring teachers in Boston, set a cut-off score of 560 out of an accepted maximum of 800 points on the NTE, a figure that matched the 70% grade formerly required to pass the BTE.[35] Persons who "pass" the NTE by scoring about the cut-off are accorded brief interviews, which are held in Boston; the interviewer marks applicants in four equal areas: appearance, use of English, personality, and attitude toward teaching. In practice, an applicant's total rank score (NTE, interview, credentials) has an almost perfect correlation with his NTE rank score, i.e., nearly everyone receives the same total score on the interview and credentials parts of the grading. Thus, as a practical matter, whether and in what order applicants for permanent teaching positions are hired depend almost entirely on their performance on the NTE.

Defendants' use of the NTE in this fashion conflicts with the recommendations of Educational Testing Service which prepares it. ETS has emphasized in several publications that the NTE results should not be the determining criterion for who is hired and who is not. The reasons are that the NTE has not been shown to have substantial predictive validity, i.e., it measures only a fraction of the characteristics required for effective classroom performance; and its

[35] The maximum score on the BTE had been 400, and 280, or 70%, was the grade required to qualify for an interview. An 800 score on the NTE was adopted by the board of examiners as the equivalent of a perfect score on the discontinued MTE and 560 was set as the cut-off thereby enabling the examiners to mix new and old lists of applicants, converting NTE scores to the old system by dividing them by two.

use assumes, in the words of an expert witness, "a kind of precision to testing that just doesn't exist." Studies conducted by ETS, of which Boston school officials are aware, indicate that blacks tend to score more poorly on the examinations than whites. Evidence of racial differences in success on the NTE is generally known to professionals in education. The effect of the cut-off [36] is to eliminate relatively more black applicants than white, and of the ranking by NTE score, to reduce the number of blacks employed as permanent teachers. Discriminatory use of the NTE has been expressly ruled to be unconstitutional. *Baker* v. *Columbus Municipal Separate School District,* N.D. Miss. 1971, 329 F.Supp. 706, 713-717.

Keenly aware of the strikingly small proportion of black teachers and administrators in the Boston school system, the defendants have for years "gone through the motions" of recruiting black teachers, but have never made a wholehearted effort to get results. The burden has fallen mainly on the shoulders of the highest ranking black official in the Boston school system, Rollins Griffith, who, as an assistant superintendent, has charge of the schools in one of six geographical areas of the city. Mr. Griffith's area embraces most of Dorchester and part of Roxbury; it has the highest percentage of black students of any area in the city. Mr. Griffith entered the system as a music teacher in 1951 and has risen steadily. In 1966 he founded the Massachusetts Negro Educators Association, now named Black Educators Association of Massachusetts (BEAM), and was its first president. In 1969, a coalition of black parents urged that he be named principal of the Campbell (now King) school and he was promoted to that position, although never

[36] Beginning in 1973, the cut-off score was reduced to 320 points, and the weight given to credentials and the personal interview correspondingly increased. The cut-off had been reduced from 560 to 400 in 1972. Whether these changes will eventually rectify past misuse of the NTE remains to be seen.

"rated" for it. In 1970 he was named assistant superintendent. For several years he has been the school system's overworked "resident expert" on matters involving black students, parents and teachers and problems of concern to the black community in general. Mr. Griffith, with one assistant, has made several trips to colleges and conventions in an effort to interest black teachers in coming to Boston. The results of his efforts have been, in his own words, "very, very poor";[37] and the reason has been obvious enough: lack of time, money, authority and cooperation from the defendants. Mr. Griffith has never been authorized to offer permanent employment "on the spot" to black candidates whom he has interviewed at distant colleges and universities, as have recruiters from other cities, including Newton, Massachusetts. He and his assistant have been allowed only to recruit black teachers willing to enter the Boston system at the provisional level. The budget for minority recruiting is much less than in other large cities and was reduced from $60,000 for 1970-71 to $34,000 for 1971-72.

Except for accepting the federal EPDA program already described, resulting in the employment of 60 black provisional teachers (of whom at least eight had left the system by the time of trial), the defendants' contribution to minority recruitment has been much talk but little action. At a meeting on July 31, 1972, a proposal to recruit black truant officers was approved and later tabled—at the time of trial there were no black truant officers, now known as supervisors of attendance, in Boston. At three other committee meetings in 1972, Mr. Griffith sought committee approval of plans to increase the number of black teachers, and none

[37] Mr. Griffith's opinion was given at a school committee meeting on August 23, 1972 in response to a question by the chairman about Boston's success in black recruiting compared with other cities. Later in the meeting, the chairman observed, "Somewhere along the line we failed."

of his proposals was adopted. The defendants' attitude is fairly reflected by the following exchange at a committee meeting on August 23, 1972:

> Mr. Griffith: Yes. I am saying that we should take a position that we should say X number of minority teachers should be hired.
>
> Member #1: That's right, and we should tell white teachers that we can't use them.
>
> Mr. Griffith: Well, somewhere over the years some minority teachers have been told that they couldn't be hired.
>
> Member #1: No question about it. But sometimes two wrongs don't make a right.

Until 1971, building level and central administrators were selected by means of a procedure known as "rating." Only permanent teachers and administrators who had been employed in Boston in their current positions from four to six years qualified for promotion. Lists of personnel "rated" for the various types of administrative positions [38] were compiled every three years and each list had a life of three years. The effect of this system was quite drastic: for example, a person appointed to a principalship in 1969 would have to have rated for the 1967 principal list, which would still be in effect in 1969, and would have had to have been teaching in Boston since the 1962-63 school year. A person wishing to "rate" applied to the board of examiners. A general prerequisite was a promotional certificate for the position desired, obtained by scoring 70% or better on an essay exam given by the examiners. This score was only a qualifying condition and did not enter the rating procedure itself, which was analogous to the initial hiring procedure: there were 800 possible points, 600 for credentials and 200

[38] Positions of assistant superintendent and above were filled not by rating but by the superintendent's selection and school committee approval.

based upon an interview as to which there were no objective guidelines. A candidate needs 760 points or more to be rated.

Few blacks successfully completed the promotional process. Between 1969 and 1971 the board compiled 39 rated lists of candidates for promotion. Twenty-five lists contained no black candidates; eight contained only one black candidate; two contained two black candidates; and three contained four black candidates. The number of candidates who qualified for promotion during those three years was as follows:

	White	*Black*
1969	331	13
1970	115	7
1971	173	5

Because blacks comprised only an estimated 1% of the teaching faculty in Boston during the early 1960's, rating requirements have had a continuing discriminatory effect, even as the number of black teachers has increased.

The school committee has shown its awareness of the problem of discrimination in the promotional process. In 1968 it commissioned a study of the promotional system by the local deans of schools of education; the resulting Deans' Report was submitted in 1970 and recommended an overhaul of the system.[39] However, the defendants acted slowly in responding to the Deans' Report. The old system is apparently suspended and the board of superintendents has been asked to recommend changes. The consequences of that system, however, remain: blacks still occupy a disproportionately small portion of Boston's administrative positions. The school committee froze the promotional

[39] This report concluded, *inter alia*, that Boston's promotion system prevented people from becoming higher level administrators in Boston until they were more than fifty years of age. The concomitant effect upon the eligibility of blacks is obvious.

system in August 1971. Nonetheless the thirty vacancies filled at the time of trial on an acting basis had all been filled by whites.

VI

Examination and Vocational Schools and Programs

A high degree of racial segregation also exists in the city's specialized high schools and vocational programs. Three high schools, Boston Latin, Girls Latin and Boston Technical, have traditionally admitted students only by competitive examination. They offer excellent college preparatory instruction and their graduates matriculate at the nation's finest colleges and universities; they are called examination schools or elite schools. Their enrollments are heavily white; and the faculties at the three schools from 1967 to 1972 averaged only one black member per school. The precise percentages of black students at these high schools for the school years beginning in the fall of the years 1967 to 1972 were as follows:

	1967	1968	1969	1970	1971	1972
Boston Latin	3.2	3.0	2.6	2.3	1.9	2.2
Girls Latin	3.5	6.1	6.3	5.3	5.4	5.0
Boston Tech.*	6.7	8.5	8.1	8.3	10.8	13.7

* The larger number of blacks at Boston Tech. is due at least partly to a cooperative industrial printing program being run there which does not admit students on the basis of an examination.

The two trade schools, Boston Trade and Girls Trade, have heavily black enrollments. The precise percentages of black students in their enrollments for the period were as follows:

	1967	1968	1969	1970	1971	1972
Boston Trade	9.6	40.7	41.3	53.2	66.5	65.2*
Girls Trade	35.7	40.0	66.0	69.8	74.8	68.7*

* In 1972-73 there were also 9% other-minority students at Boston Trade and 6.8% at Girls Trade. In previous years the other-minority enrollment at these schools was negligible.

The city also operates various industrial trade programs at several regular high schools whose enrollments are predominantly white. The question presented is whether the racial segregation in these high schools and programs is intentional and therefore unconstitutional. The test to be applied is stated in *Keyes* v. *School District No. 1, Denver, Colorado, supra,* at 208. On the basis of the presumption created by the defendants' segregative practices in other parts of the school system, we conclude that these schools and programs have been intentionally segregated.

The controlling principles appear in the *Keyes* case which held that "a finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious. It establishes . . . a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions." We have heretofore made detailed findings of intentional segregation of students and staff at all grade levels and in all parts of the city. Plaintiffs have shown racial segregation in the examination and vocational schools and programs, thereby establishing "a prima facie case of unlawful segregative design on the part of school authorities" with respect to such schools. The burden of disproving unlawful intent thereupon falls upon the defendants, who in this case have failed to carry that burden. The presumption created by their general course of conduct stands.

There was not a great deal of evidence received at the trial on the question whether the defendants intended that the examination schools be segregated; but most of what was introduced tended to support the validity of the presumption discussed in the *Keyes* case. Their racial identi-

fiability is unrelated to the neighborhoods in which they are located: Boston Tech is surrounded by black residential neighborhoods, Girls Latin is located on the border of the black residential area in Dorchester, and Boston Latin is in the Fenway section, more of an institutional than residential area. Their enrollments are all citywide, with approximately 24 buses transporting students to each school. Admission may be at the level of the 7th grade or the 9th. The examinations given prior to 1973 were achievement tests for English and mathematics rather than aptitude tests. It is generally accepted that blacks perform poorly on this type of examination. Racial statistics as to the percentages of whites and non-whites who passed the examinations are available for 1971 and they confirm the generally accepted understanding, showing a widely disparate success rate for whites versus non-whites:

	Boston Latin		Girls Latin		Boston Tech	
	7th	*9th*	*7th*	*9th*	*7th*	*9th*
White	25.4	7.5	24.4	2.5	52.2	32.8
Non-white	4.3	0	6.6	0	21.5	9.2

While there is no specific evidence in the record that the examinations discriminate against blacks, computer printouts prepared by the defendants as early as 1966 demonstrated that students at schools with high percentages of whites had a success rate two to three times greater than students from schools with high percentages of blacks. In 1971 charges of racial discrimination in admission to the elite schools were filed with the Massachusetts Commission Against Discrimination. The defendants agreed to a settlement of those charges in May 1972 which provided that for three years beginning in 1973 the defendants would use entrance examinations prepared by the Educational Testing Service of Princeton, New Jersey, and reserve seats, 84 at the Latin schools and 28 at Boston Technical for four

students from each of the under-represented districts of the city.

In addition to the full range of vocational training given at the citywide trade schools and the printing course at Boston Technical, whose racial compositions have already been shown,[40] part-time cooperative vocational programs are offered at six district high schools[41] at which the percentages of black students from 1967 to 1972 were as follows:

	1967	1968	1969	1970	1971	1972
South Boston	0	0	0	0	0	.05%
Charlestown	1.3%	1.4%	.8%	3.3%	2.0%	1.9
East Boston	1.1	1.9	2.2	1.6	2.5	4.4
Brighton	30.4	36.2	24.9	26.5	23.1	16.8
Hyde Park	3.7	3.9	7.8	12.0	15.2	18.8
Dorchester	20.6	26.1	35.4	37.9	52.1	57.7

These figures do not show the degree of segregation in the vocational programs as such, but do warrant an inference at least as to courses at South Boston, Charlestown and East Boston that enrollments in the vocational programs at those schools have been predominantly white. Also, in a few instances precise racial information about particular vocational programs at some schools was received in evidence: (a) the electrical program at Charlestown had 406 students, of whom approximately 6 were black and 6 other-minority, (b) the machine shop program at Hyde Park had 94 students in grades 10 to 12, of whom 5 were black, and

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[40] No specific evidence was offered regarding programs at predominantly white district high schools comparable to the courses given at Girls Trade. Thus our finding that Girls Trade is unconstitutionally segregated rests solely upon its racial composition, 25% white and 75% non-white, in the light of other findings on the issue of defendants' intent

[41] Also, an agricultural vocational course is offered at Jamaica Plain for about 80 students who are placed in summer jobs; however there was no evidence of these students' races and accordingly we make no findings as to that vocational program.

(c) of an unspecified number of students in the printing program at Boston Technical, about 20% were black.

The type of vocational training offered at the predominantly white district high schools is quite different from that at predominantly black Boston Trade. In the latter, students spend all their time at school and learn their trades in workshops at school. In the district high programs, the school conducts "cooperative-industrial" courses featuring part-time employment obtained by the school for vocational students in the 11th and 12 grades, which enables them to earn an average of $1,800 per year. Students may keep their jobs after graduation. Typically, a student alternates weeks in regular classes and on the job, e.g., a student in auto mechanics works every other week in a garage, where his performance is graded by his employer and reported to the school. There are educational advantages to both types of programs.[42] On the one hand, students at Boston Trade receive more supervision by instructors and a broader range of experience than students gaining on-the-job experience in cooperative programs. A student at Trade may change from one vocation to another, whereas a vocational student in a district high school may not change without also changing schools. On the other hand, students in the cooperative courses may receive experience in some type of work not undertaken at Boston Trade because of the cost of materials. Regarding strictly academic courses, there are no differences other than the scheduling of classes. Students in the district high programs are not awarded a diploma, however, until they have completed one year of full-time work in their chosen fields after their regular high school years.[43] This withholding is wholly

[42] It does seem ironic that the cooperative-industrial program supplies the economic advantage which would be most helpful to the black students: job access.

[43] Of 353 "extra-year" cooperative-industrial students in district high schools in 1972, the only year as to which such figures were introduced, 323 were white.

unrelated to academic studies since only the extra year of work experience is required for the award of the diploma; apparently it is designed to encourage students to remain in the same jobs after completing their classroom studies and to help them adjust to the transition from part-time to full-time employment.

As in the case of the examination schools, little evidence was offered on the issue whether the racial segregation of vocational students was purposeful; and the presumption of unlawfulness described in the *Keyes* decision was not rebutted. In fact, some independent evidence buttresses the court's reliance on the presumption in finding unconstitutional segregation in the vocational programs: (a) there are no black instructors in the vocational programs at South Boston, Charlestown and East Boston—whether there are any in other district high programs did not appear in the evidence; (b) on-the-job training could be arranged for students at Boston Trade, but has not been; (c) cooperative-industrial courses have never been arranged for students at English, Girls High and Burke, the only predominantly black high schools other than the two trade schools; and (d) program coordinators of the district high programs focus their efforts to interest junior high school students in enrolling in cooperative-industrial courses on predominantly white junior highs.

Boston Trade and Girls Trade will both close when a new vocational facility opens, the Occupational Resource Center, which will be a central facility offering vocational programs to students at high schools throughout the city. Boston Trade opened in 1912 and has been in urgent need of repairs and renovation. In 1970 the man later selected to be director of the proposed new Center wrote a memorandum of reasons for not building a new four-year residential trade school; his first two reasons were:

"1. Statistics indicate that an alarming rate of pupils are dropping out of our trade schools.

2. Residential trade school pupils suffer from a sense of inferiority and the students going into it are generally regarded as second-rate people who cannot survive in the college-directed program."

Residential Segregation and Neighborhood Schools

In addition to defendants' contentions discussed *ante*, defendants have raised two major defenses which pertain to a number of plaintiffs' claims. First, they contend that the segregation in Boston's schools is the inevitable consequence of segregated housing patterns and the increase in the city's black population for which they are not responsible. Second, they assert that they have adhered to a neighborhood school policy which is constitutionally valid regardless of any segregative consequences. These two arguments are not wholly separate; rather, they have both a common factual basis in this case and an analytical inter-relationship. For a school to reflect the racial composition of the area in which it is located, attendance must obviously be based upon a district which is to some degree the same as the area around the school. This "district" may or may not be a "neighborhood" and the school may or may not be a neighborhood school. However, the major thrust of the defendants' first point would be that if the school district boundary predated a segregated housing pattern within that district, there is no constitutional violation. By contrast, the defendants' second point about their alleged neighborhood school policy interjects something else: nonracial, presumptively valid governmental reasons for decision making. These would include such things as the safety of the child by providing a nearby school and fiscal economy by avoiding the costs of transportation. Because the two defenses overlap, we shall discuss them together.

Initially it should be pointed out that these defenses are only partial, i.e., neither argument has any relevance to the defendants' practices with respect to faculty and staff, open enrollment and controlled transfer or feeder patterns. These three areas of the defendants' conduct, in which abundant evidence of segregative intent was found, are unrelated to residential segregation or neighborhood schools. Boston's faculty and staff are not assigned on the basis of residence; open enrollment and controlled transfer are both inimical to a neighborhood school system; and high schools are not neighborhood schools.

There are various answers to the defendants' arguments: first, it is now generally recognized that school officials' practices may have a substantial impact upon housing patterns; second, when school officials have followed for at least a decade a persistent course of conduct which intentionally incorporated residential segregation into the system's schools, that conduct is unconstitutional; and, third, when school districting and a neighborhood school system are fraught with segregative exceptions, neither defense need even be considered.

It is now generally agreed that schools and neighborhoods have a reciprocal effect upon one another. There is a substantial interaction: a school will cause the racial composition of the neighborhood to shift and vice versa. Both plaintiffs' and defendants' expert witnesses testified as to this. These phenomena have been recognized and discussed in many cases, e.g., *Swann* v. *Board of Education*, 402 U.S. 1, 20-21:

> "People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods."

See also *Felice* v. *Board of Education of New York City*, E.D. N.Y. 1974, —— F. Supp. ——; *Higgins* v. *Board of Education of Grand Rapids*, W.D. Mich., July 18, 1973, No. 6386. We shall not dwell upon the point beyond stating that in this respect Boston is not unlike other major urban areas, and that defendants may not disclaim responsibility for segregated schools because of population shifts which they themselves may have contributed to bringing about. Because of the complexity of the point and the difficulty of identifying and separating causes versus effects and their reciprocal dimensions, we rely more directly upon the considerations which follow.

The defendants have, with awareness of the racial segregation of Boston's neighborhoods, deliberately incorporated that segregation into the school system. This has been accomplished through construction practices and facilities utilization. With respect to school construction, the defendants have pursued a pattern of building relatively small schools to serve defined racial groups. These practices were not founded solely upon private discrimination, but also incorporated unconstitutional discrimination by other governmental officials. The 1960 United States census reported that 97% of Boston's black population lived within Roxbury, Dorchester and the South End. This segregated housing configuration had not been altered noticeably by 1970 — only the number of black residents and the basic area in which they reside had expanded. The concentration in these three areas remained the same.

It has been asserted that residential segregation exists in our cities regardless of law, policies and other forms of discrimination. Taeuber, *Negroes in Cities* 36 (1965). We shall never know whether Boston's segregated housing patterns would have evolved as they are today absent longstanding and thorough governmental complicity. Local, state and federal agencies historically followed discrimina-

tory policies with respect to housing with consequences that remain clearly visible.[44] Nor is there any present prospect of a reversal of the segregated housing patterns which were brought about by governmental action. The Boston Housing Authority built and maintained racially segregated housing projects, making tenant assignments on an explicitly racial basis. The Federal Housing Authority maintained an official policy of racial compatibility in housing. See 1938 FHA Underwriting Manual § 980 (3)(g). As recently as 1971 Boston banks providing FHA mortgages as part of the Boston Banks Urban Renewal Group (BBURG) would grant mortgages to blacks only within a specific geographical area of the city. This was done for the avowed purpose of preserving racially homogeneous neighborhoods. These funds were virtually the only source of home financing for law and moderate income black families. The Massachusetts Legislature outlawed housing discrimination in 1950 with little if any result. The complementary consequence of private discrimination in the sale and rental of housing was also established by testimony at the trial. The combined effect of this private discrimination and the BBURG program was to limit blacks to a block-by-block expansion of the areas in which they could obtain housing during the late 1960's. This kind of expansion, most commonly associated with the term "block-busting", does not result in integrated housing.

In 1972 there were twenty-five housing projects in Boston; twelve were 79% or more white and thirteen were 73% or more black. This residential segregation was readily observable in Boston and widely known. In Boston

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[44] We refer to explicitly racial policies, not presumably neutral policies which may also have had a foreseeably segregatory impact. See generally, *Hart* v. *Community School Board of Brooklyn*, E.D. N.Y. 1974, ___ F.Supp. ___.

the term "Roxbury" probably carries many of the connotations which "Harlem" does in New York City. Unfortunately, streets in disrepair, burned out houses left standing, and rubbish left on side streets in parts of Roxbury cannot help but intensify the identification of parts of this section of the city. The defendants were not ignorant of these segregated housing patterns and projects, which were a frequent topic of discussion at school committee meetings from at least 1963 until the time of trial. In fact the defendants had unusually detailed knowledge of existing residential segregation and forecasts for changes because of a study commissioned by them in 1962. This study, the Sargent Report, predicted with 95% accuracy the size of the black population and those neighborhoods in Boston which would become predominantly black by 1970. Those predictions were confirmed by the 1970 United States census. The existence of this report is a sufficient answer to defendants' intimation that they were surprised by shifting racial concentrations which frustrated their racial balance plans.

A substantial correlation exists between racial segregation in Boston public housing and in nearby schools. In 1972, for nine public housing projects which are 80% black, there were 33 schools, all of which are majority non-white.[45] Similarly, 38 schools serving eleven 80% white housing projects are all majority white, and 29 of them are more than 80% white. This correlation between residential segregation and school segregation is the direct result of school construction projects between 1953 and 1972. Specifically, the small size of these schools was such that their enrollments could not but reflect the racial composition of

[45] Racial censuses of housing projects were taken on the basis of white and non-white. How many blacks are included in the non-white figures did not appear. However, since the other minorities in Boston comprise only a small percentage of the city's population, the predominant part of the non-white population is most probably black.

the immediate neighborhood. Their locations were such that it is readily inferable that their racial compositions were intended; many were located within housing projects, bordered on three sides by them, directly adjacent to them, across the street from them, or on the same block. At least twenty such elementary schools were built near racially segregated housing projects; the Dever, Tobin, Hurley, Prescott, Carter, Aggasiz and Hennigan schools are prime examples. The defendants have also built additions to segregated schools or used portables which perpetuated the racial composition of those schools and neighborhoods. The following table demonstrates the extensive construction of school facilities near segregated housing projects and shows the racial composition of both in the year when the new school, addition or portable opened:

			Percent White	
Year Opened	*New School*	*Housing Project*	*School*	*Project*
1953	Fairmont	Fairmont		100
1956	Guild –a	Orient Hgts.		100
1957	Greenwood	Fairmont		100
1957	Dever	Columbia Pt.		93
1958	Bradley	Orient Hgts.		99
1958	Grew	Fairmont		100
1959	Tobin	Mission Hill Ext.		25
1961	Hurley	Lennox & Camden		2
1963	Prescott	Charlestown		99
1964	Grew –a	Fairmont		100
1964	Greenwood –a	Fairmont		100
1967	McCormack	Columbia Pt.	43*	54
1967	Taylor –a	Morton St.	83	98
1967	P. Bates –p	Wash. & Beech	88	89
1967	Bi~ low –p	D Street	94	94
1967	Hoar –p	D Street	91	94
1967	Paine –p	Franklin Hill	69	79
1971	Carter	Lennox & Camden	5	3
1971	Lee	Franklin Field	21	13
1972	Agassiz	South Street	81	79
1972	Hennigan	Heath Street	24	1

"–a" signifies an addition to an existing school.
"–p" signifies a portable.
* 1967 was the first year for which racial breakdowns of school enrollments were available.

Several of the schools and expansions shown in the table were opened as the racial composition of the nearby housing development was in the process of changing from white to black. Examples of such projects are listed as follows, together with the name of the nearby school or expansion and the percentages of the units in the projects occupied by white residents in the following years: (1) three years before the opening of the school or expansion, (2) the year in which the school or expansion was opened, and (3) in 1972, the latest year for which figures were introduced in evidence:

Housing Project	*School or Expansion*	(1)	(2)	(3)
Mission Hill Ext.	Tobin	38%	25%	4%
Columbia Pt.	McCormack	74	54	27
Franklin Hill	Paine–p	93	79	7
Franklin Field	Lee	80	13	8
Heath Street	Hennigan	24	1	1

These changes were due partly to the Boston Housing Authority's practice, when black residents gained access to a predominantly white public housing project in more than token numbers, of avoiding referral of white applicants to that project but referring only black applicants.[46] The extent to which these changes in the racial compositions of housing projects may also have been attributable to the reciprocal effect of a nearby school, alluded to *ante* at 121-122, is of course unknown. In any event, it should have come as no surprise to the defendants when the schools opened imbalanced and became more imbalanced thereafter. The opening racial composition of Tobin was not in evidence because it opened before 1967; it was shown, however, that in 1967-68 Tobin was

[46] Apparently no housing project which has fallen below 80% white has stabilized at that point, but has shown a steady and rapid progression toward 100% non-white. The black percent of the total population of Boston was 13.9% in 1970 and 16.3% in 1972.

31% white. A possible exception to the pattern of imbalanced openings was the portable at Paine; the school as a whole, when the portable was opened, was balanced, i.e., 69% white. But by 1972, the school as a whole was heavily imbalanced with an enrollment of only 5% white, matching almost exactly the racial composition of nearby Franklin Hill project, by then 7% white. Conceding confusion as to some causal relationships, one consequence of the location of the new schools and expansions was clear: the containment of children, black and white, in schools near the housing projects in which they lived, effectively incorporating the segregation practiced with respect to public housing by other government officials.

The defendants have argued that they began a program of constructing larger elementary schools which could accommodate students from a number of neighborhoods of differing racial compositions so that the schools would be racially balanced. It is true that larger schools were opened, but not due to the defendants' initiative. The defendants began to construct larger schools only in 1966 when the state refused to approve construction plans which would have resulted in more segregated schools. That year the defendants proposed the construction of three schools, one each in the Marshall, Mather and Gibson districts. Each of these schools, given their size and location as proposed by the defendants, would have opened racially segregated. The state board insisted that two large elementary schools be built instead. Then when larger schools were opened, particularly Hennigan and Lee, defendants resorted to other kinds of segregative practices which have been the subject of previous findings.

As for the defendants' asserted neighborhood school policy, findings heretofore made prove that it was so selective as hardly to have amounted to a policy at all. Several practices of the defendants were antithetical to a

neighborhood school system: extensive busing, open enrollment, multi-school districts, magnet schools, citywide schools and feeder patterns. Additionally, the elementary district map, *ante* at 47, does not show districting which would be consistent with a neighborhood school policy: schools are not located near the center of regular, compact districts, but rather near the edges of irregular districts requiring some students to attend a relatively distant school when there is another school within one or two blocks. Notice, for example, the relative distance from a residence just east of the broken, dividing line to Emerson and Clap, Fenwick and Everett, and Dickerman and Mather. When the defendants have emphasized considerations of distance and safety, it has usually been when they could be used to maintain segregation; students have seldom been the benefactors of this concern when there was no prospect of integation. The neighborhood school has been a reality only in areas of the city where residential segregation is firmly entrenched. Thus students in South Boston or Roxbury have been assured of attending a neighborhood school, all white or all black. White students who found themselves in predominantly black schools because of their residence were practically guaranteed a right to transfer under open enrollment or one of the exceptions to the controlled transfer policy — regardless of overcrowded conditions at the receiving schools. Therefore, as the third response to the partial defense of residential segregation and neighborhood schools raised by the defendants, a further quotation from the *Keyes* case, at 212, is apposite, as follows:

> "[W]e have no occasion to consider in this case whether a 'neighborhood school policy' of itself will justify racial or ethnic concentrations in the absence of a finding that school authorities have committed acts constituting de jure segregation . . . . the mere

> assertion of such a policy is not dispositive where, as in this case, the school authorities have been found to have practiced de jure segregation . . . of the school system by techniques that indicate that the 'neighborhood school' concept has not been maintained free of manipulation."

The arguments raised by the defendants in this case have been identical to those in the *Keyes* case in that they are mere assertions. See also *Spangler* v. *Pasadena Board of Education,* C.D. Cal. 1970, 311 F. Supp. 501, 522; *Davis* v. *Pontiac School District,* E.D. Mich. 1971, 309 F. Supp. 734, 744, *aff'd* 6 Cir. 1971, 447 F.2d 573, *cert. denied,* 1971, 404 U.S. 913; and *Taylor* v. *New Rochelle,* 2 Cir. 1961, 294 F.2d 36, 39.

Inseparability of District

In considering the ramifications of the defendants' segregative conduct, further attention must be paid to the city's geography and the natural boundaries that lie within it. This necessity is explained in *Keyes* v. *School District No. 1, Denver, Colo., supra,* at 200-205, from which the following excerpts are taken:

> "We have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system." *Id.,* at 200.
>
> "This is not a case, however, where a statutory dual system has ever existed. Nevertheless, where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system." *Id.,* at 201.

> "In short, common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions. This is not to say, of course, that there can never be a case in which the geographical structure of, or the natural boundaries within, a school district may have the effect of dividing the district into separate, identifiable and unrelated units. Such a determination is essentially a question of fact to be resolved by the trial court in the first instance, but such cases must be rare. In the absence of such a determination, proof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of the existence of a dual system." *Id.*, at 203.

As previously mentioned, certain areas of the city, Charlestown, East Boston, Brighton and South Boston are fairly intact communities with somewhat restricted access to other parts of the city. The first two areas in particular are separated from the rest of Boston by the Boston inner harbor. Is either of them or any other part of Boston "a separate, identifiable and unrelated section of the school district that should be treated as isolated from the rest of the district"? *Id.*, at 213. This inquiry was considered at the HEW administrative proceeding in which both the trial judge and the reviewing authorities adopted the government's limitation of the Boston school system for the purpose of its analysis which excluded both East Boston and South Boston schools as being in "geographically distinct areas." Initial Decision dated March 2, 1973, at 14. The administrative judge divided the Boston schools, for purposes of his opinion, into a central system, an East Boston subsystem and a South Boston subsystem. *Id.*, at 72.

However, no section of the city is "separate, identifiable

and unrelated'' within the meaning of the *Keyes* case. Charlestown and East Boston are separate but in no way isolated. Ready access to Charlestown may be had by the Charlestown Bridge or the Northwest Expressway or the Charles River dam via Prison Point Bridge. East Boston and the center of the city are connected by two double-lane one-way tunnels, the Callahan Tunnel heading north and the Sumner Tunnel south. Each section is served by frequent public rapid transportation which connects with all other parts of the city and makes three stops in each section. Brighton[47] is accessible both by public transportation and several major streets, including Commonwealth Avenue and Beacon Street.

Charlestown, East Boston and South Boston schools are in no way unrelated to those in the rest of the city. In making this evaluation several discussions, *ante,* are relevant but will not be repeated, viz., feeder patterns, overcrowding, open enrollment, vocational programs, and practices with respect to faculty and staff. All of the city's schools are administered centrally by the school committee and the central administrative offices under the superintendent. For many years Boston's schools were all city-wide schools insofar as open enrollment was the official school policy; the only theoretical limits on this policy were available seats and the students' desire to enroll.

Students from the three conceivably separate sections are transported on city-operated buses to the elite high schools located in other parts of the city, as shown in the following figures for 1972:

	Charlestown	*East Boston*	*South Boston*
Boston Latin	38	60	84
Girls Latin	12	35	30
Boston Tech.	23	60	72
TOTAL	73	155	186

[47] It has never been suggested by anyone that Brighton is separate or its schools unrelated; so no further findings will be made about that section of Boston.

Students from these same sections are also transported at city expense to Trotter and Lewis, the elementary and intermediate components of the model demonstration subsystem. Similarly, students from the other sections of Boston listed below were in attendance at public high schools in the three sections in question during 1972:

	Charlestown	*East Boston*	*South Boston*
Roslindale	46	2	1
Roxbury	12	3	19
South Boston	20	—	—
West Roxbury	15	—	—
North End	105	2	—
South End	29	27	2
Charlestown	—	1	1
Dorchester	97	12	764
East Boston	18	—	1
Jamaica Plain	27	1	—
TOTAL	369	48	788

Lesser numbers of out-of-district students also attended junior high schools in the sections in question.

Lastly, the defendants were parties to the HEW proceedings, Docket No. CR-982, 72-1, in which their main witness was William G. Tobin, deputy superintendent until his retirement in September 1970. The summary of his testimony, at 42 of the Initial Decision, states that Mr. Tobin "further asserted there was no area in the school system designated either as a central system, a South Boston system or an East Boston system. The entire system operated as a single integral system." This court agrees.

State Defendants

The plaintiffs' case against the state defendants, generally speaking, is that they have not exercised their powers to prevent various segregative acts by the city defendants. Plaintiffs point in particular to the fact that the state board approved racial balance plans that effectively promoted segregation. They also assert that the

state defendants, the state board of education and commissioner of education, failed to reduce segregation by use of their specific statutory powers with respect to school construction, transportation aid, vocational programs and educational standards for professional personnel. In the court's opinion, however, the evidence does not warrant a finding that the state defendants intentionally contributed to or participated in any substantial way in creating or maintaining racial segregation in the Boston public schools. On the contrary, the evidence established that they did everything within their limited authority under the law to compel the city defendants to obey the state law and the federal constitution.

True, the state board approved four separate racial balance plans for Boston. However, each plan, if it had been executed in good faith, might have made a substantial contribution to the elimination of racial segregation in Boston's schools. The failure of these plans was uniformly the result of the city defendants' failure to carry them out promptly and to take steps necessary for a particular proposal to have been effective. The state defendants consistently made or endorsed suggestions that the city defendants either refused to accept or accepted only after long delays, including redistricting, the use of portables to reduce segregation, changes in feeder patterns, restriction of open enrollment and transportation. Additionally, the state board voted several times to withhold financial aid because of what it considered to be failures on the part of the city defendants to comply with the state law or execute racial balance plans which had been approved. The withholding of state aid pursuant to Mass. G.L. c. 15, § 1I was the ultimate sanction that the board had under state law.

In at least two instances the state board forced the defendants to modify plans so that schools might open ra-

cially balanced. Marshall, which opened racially balanced, was originally planned by the city defendants on June 13, 1966 for only 700 pupils. The state defendants rejected that plan on June 28, 1966 and directed that the school be expanded to at least 1200 in order to accommodate several hundred additional white students. In February 1967 the city defendants agreed to expand the school plan to an enrollment of 1000 students and the state board approved. But for this expansion Marshall would have been majority black because of its location. Holland similarly opened racially balanced only because of the state board. The original plan of the city defendants on June 6, 1966 provided for two schools: one in the predominantly white Mather district and another in the predominantly black Gibson district. This plan was rejected by the state board, which recommended a single project combining those districts. The city's February 1967 plan partially adopted this recommendation and the state contributed 65% of the cost.

The state defendants' efforts to reverse the increasing segregation in Boston's schools was considerably hampered by the limited authority conferred upon them by statute. The board was given only ultimate weapons, viz., the withholding of state funds and resort to the state courts, rather than authority over the management of Boston's school system. Given the method of evasion adopted by the city defendants, formalistic compliance followed by procrastination and evasion on technical grounds, the means of enforcement at the board's disposal were highly ineffective. Sometimes funds withheld to force the adoption of specific proposals had been released before the city defendants' techniques for evasion became known to the board, as happened after the fourth stage plan was approved in August 1971. Similarly, judicial process is slow and unwieldy as a sanction in the hands of an administra-

tive agency operating under a statute as complex and technical as the Racial Imbalance Act. The state defendants were simply outmaneuvered by the city defendants and frustrated by their intransigence and frequent bad faith. These attitudes were exhibited, for example, at a meeting of the school committee on April 8, 1971 at a time when $28,000,000 in state financial assistance was being withheld and the state board was requesting that the committee submit a fourth stage plan including districting of high schools and elimination of open enrollment. The committee was discussing how it should counter the state board's demands. One member proposed a vote that the chairman of the board's committee on racial imbalance be taken off the job. Referring to the city's Education Planning Center which would draw up the city's plan, the following exchange occurred:

> Superintendent: My team will make your plan — not my plan but the School Committee's plan. I have to keep saying that.
>
> Chairman: We will be the bad guys. That is what we were elected for.

Eventually the state defendants charged unconstitutional segregation by the city defendants in the state court, where the claim was denied for insufficient proof, and in a crossclaim in this case. The racial imbalance plan which the state defendants finally succeeded in imposing upon Boston by Supreme Judicial Court orders dated January 16, March 22 and April 17, 1974, which is scheduled to take effect in September 1974, is the latest demonstration of their best efforts.

If the court were concerned only about liability issues, judgment would be entered in favor of the state defendants; but, in view of its conclusions, it must also deal with the remedies to which plaintiffs are entitled. The state board and state commissioner have ultimate respons-

ibility for the education of pupils in the Boston public school system. Therefore, although they have not contributed to the racial segregation that pervades the Boston schools, their continued presence in these proceedings may be necessary for the effectuation of appropriate remedies. The state defendants will be retained as parties defendant for purposes of formulating and aiding in the execution of such remedies. See *Griffin* v. *County School Board of Prince Edward County*, 1964, 377 U.S. 218, 234; Rule 19(a), Fed. R. Civ. P.

Conclusions of Law

Keyes v. *School District No. 1, Denver, Colo.*, 1973, 413 U.S. 189, furnishes a blueprint for decision of the liability issues in this case, as follows: (a) whether racial segregation exists in parts of the Boston public school system; (b) if so, whether such segregation was intentionally caused and maintained by the defendants; (c) whether any parts shown by plaintiffs to have been intentionally segregated constitute a substantial portion of the school system, i.e., whether defendants' intentionally segregative conduct affected a substantial portion of the students, schools, teachers and facilities within the school system. If plaintiffs prevail on these issues, it follows that there is *de jure* segregation in the city and that the defendants' obligation to eradicate it is no less than if it were due to a local ordinance requiring separate school facilities for different races. There will remain for decision, however, a fourth issue governing the nature and extent of the defendants' obligation to desegregate and of the remedies which must be ordered by the court, viz., (d) whether, after considering any evidence that the system is geographically separable or that segregative intent was not among the factors that motivated the defendants' actions, as a result of (a), (b) and (c) the entire school system is a dual system, one for white students and one for black students.

Plaintiffs proved beyond question that racial segregation exists in parts of the Boston public school system. That issue was virtually uncontested. In reaching this conclusion we have taken into consideration the racial composition of school enrollments and faculties and staff, community and administration attitudes toward the schools and factors of geography and demography. See *Keyes* v. *School District No. 1, Denver, Colo., supra,* at 196.

The paramount issue in this case is whether the defendants acted with a "purpose or intent to segregate", *Keyes* v. *School District No. 1, Denver, Colo., supra,* at 208, i.e., either with a desire to bring about or continue segregation in the Boston schools or with knowledge that such segregation was certain, or substantially certain, to result from their actions. See 1 Restatement of Torts 2d, § 8A, comment b; Prosser, Torts (3d Ed.) 31, § 8. In resolving this issue, the court need not ascertain the ultimate reason why the defendants made certain decisions. For example, in voting to permit black students to remain in Lee and white students to continue at Fifield and O'Hearn, a school committee member might have been prompted by a desire to improve his prospects for reelection — that would be his motive for so voting, not his intent in so voting. Motive is what prompts a person to take some action toward achieving a result; intent refers to his decision to do a particular act as a means of achieving that result. This is not of course to say that motive may not be relevant to intent; just that they are to be distinguished. Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind; but may be inferred from the surrounding circumstances. The opinion of the court in *Keyes* used the word "motivated" a number of times, at 208-210, but always in the context of the school authorities' negative burden if plaintiffs should first succeed in proving

substantial intentional segregation. To permit school authorities to offer evidence of their own motivations, peculiarly within their own knowledge and control, to rebut plaintiffs' prima facie case is quite different, in our view, from requiring plaintiffs to adduce evidence of defendants' motivations.[48] A long line of decisions beginning with *Brown* v. *Board of Education*, 1954, 347 U.S. 483, established that a dual school system explicitly imposed by law is unconstitutional. The *Keyes* case simply makes it clear that the intentional imposition of a dual school system by covert or subtle means is equally unconstitutional. It should be clearly understood that racial hostility is not the applicable standard. Segregation need not have been inspired by any particular racial attitude to be unconstitutional. *Johnson* v. *San Francisco School District*, N.D. Cal. 1971, 339 F. Supp. 1315, 1318. Also, the intent to segregate need not be the sole purpose for the defendants' actions; it need only be one of them.

The question to be decided therefore is whether the defendants have followed a deliberate policy of separating students on the basis of race. Even this statement is an oversimplification since a course of intentionally discriminatory decisions, all arrived at independently, which over the years has produced a dual school system, would be equally unconstitutional although there was no proof of a common scheme linking each decision. Cf. *Higgins* v. *Board of Education*, W.D. Mich. 1973, No. 6386 (slip op. at 90, 103). This discriminatory purpose may be shown in a number of ways. There may be direct evidence of discriminatory purpose, e.g., that segregative steps were taken by the defendants in response to the demands of

[48] We do not read the Court's opinion in *Keyes* as Mr. Justice Powell seems to do, at 231, to hold that "the motivation of school board action is . . . controlling in Colorado", except when school authorities succeed in rebutting plaintiffs' prima facie case.

voters favoring segregation. Similarly, statements by the defendants at the time of decision-making may show discriminatory purpose. Indirect evidence of segregative intent would include the absence of valid educational, fiscal, administrative or other governmental justifications for decisions having clearly foreseeable segregative consequences. Also, in a limited number of situations, e.g., distribution of faculty and staff, an inference of the proscribed intent may arise simply from existing segregation. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 1971, 402 U.S. 1, 18.

The obvious difficulties of ascertaining the intent of the administrators of a municipal school system like Boston's were mentioned in all four opinions in the *Keyes* case. Although that case was decided after the trial in these proceedings, the volume and scope of the evidence introduced by the parties and of the requests for findings of fact filed after trial have enabled the court to embark on the teleological course order by the *Keyes* case and charted by Mr. Justice Powell in his opinion, concurring in part and dissenting in part, at 234-235, as follows:

> "Every act of a school board and school administration, and indeed every failure to act where affirmative action is indicated, must now be subject to scrutiny. The most routine decisions with respect to the operation of schools, made almost daily, can affect in varying degrees the extent to which schools are initially segregated, remain in that condition, are desegregated, or — for the long term future — are likely to be one or the other. These decisions include action or nonaction with respect to school building construction and location; the timing of building new schools and their size; the closing and consolidation of schools; the drawing or gerrymandering of student attendance zones; the extent to which a neighborhood

> policy is enforced; the rescruitment, promotion and assignment of faculty and supervisory personnel; policies with respect to transfers from one school to another; whether, and to what extent, special schools will be provided, where they will be located, and who will qualify to attend them; the determination of curriculum, including whether there will be 'tracks' that lead primarily to college or to vocational training, and the routing of students into these tracts; and even decisions as to social, recreational, and athletic policies." [49]

The court's findings have necessarily been divided into categories, but the ultimate finding as to segregative intent rests upon the record as a whole, including the multiplicity and cumulative effect of the defendants' policies and practices. A good example of this aspect of the defendants' conduct appeared in the fall of 1971 after the state board on August 31 approved their amended fourth stage plan which provided for (a) the replacement of open enrollment by controlled transfer, (b) a citizens' advisory committee to prepare redistricting plans to achieve racial balance, (c) a comprehensive long-range plan to be formulated with technical assistance to be furnished by the state board and overseen by a special committee, (d) the opening of Lee with a district which would guarantee a balanced school, (e) the opening of Hennigan on a balanced basis, and (f) the construction of a new English which would open balanced. By the end of 1971 the defendants had succeeded in (1) eviscerating the controlled transfer policy by creating exceptions and encouraging their use, (2) sabotaging the advisory committee by appointing persons known to be vehemently opposed to redistricting and instructing them to employ delaying tac-

[49] There was an absence of evidence only as to social, recreational and athletic policies.

tics, (3) preventing the formation of a comprehensive long-range plan by refusing the state board access to data necessary to render technical assistance and failing to appoint members to the special committee, (4) permitting a crisis to grow which provided an excuse to open Lee racially segregated and allow children of protesting white parents to remain in Fifield and O'Hearn, and (5) opening one wing of Hennigan on a segregated basis. Also during the 1971-72 school year the defendants were (6) busing 130 black first to third grade students to relatively distant Weld, (7) continuing the existing pattern of overcrowding in predominantly white schools while predominantly black schools had available space, (8) opening new annexes, Charlestown and Carter Temporary, to perpetuate segregation, and (9) rejecting suggestions for the use of portable for the alleviation of racial imbalance.

The record on which the court has relied in determining whether defendants acted with segregative intent also includes several hundred pages of stenographic transcripts of school committee meetings. In some instances excerpts from the transcripts have been included in the court's findings. The transcripts themselves, however, are far more probative than any excerpts. Unfortunately they present a problem which must be addressed directly if the basis for the court's conclusions is to be clear, in that they contain numerous degrading characterizations of black students, e.g., "Negro immigrants from the South",[50] by one former, perennial committee member who stated three pages later, "You certainly have a right to say that I

[50] "I think the facts of the matter are that the Negro immigrants from the South are disinclined to put their effort into our northern type of education . . . ." (June 28, 1971, at 63); "The Southern Negro pupil is not as spry usually in his eagerness to learn as other children, and therefore the more lively children, the lively Negro children and the lively white children, start to move out, often the white children leading the outward procession." (June 1, 1971, at 105.)

seem to be talking about letting the Negroes have their own schools and the whites have their own schools." The court has placed very little reliance on this type of evidence, which showed beyond doubt the segregative intent of that member, because it did not represent the attitude of most committee members. On the other hand, it has been impossible to overlook it completely, because this member was elected chairman by his colleagues for two years and rarely if ever did any member take exception to his remarks. The court has looked for and weighed valid, non-discriminatory justifications for the defendants' decisions and actions. Only when there were none or when there was clear evidence of discriminatory purpose has the court found that the defendants' intent was segregative. Lastly, the court has endeavored to view the evidence, not with perfect hindsight, but with the perspective and in the chronology and context in which the defendants would have decided upon choices open to them.[51]

Applying these principles, the court concludes that the defendants took many actions in their official capacities with the purpose and intent to segregate the Boston public schools and that such actions caused current conditions of segregation in the Boston public schools. The findings of fact stated in the preceding divisions of this opinion have described practices which have been ruled to be unconstitutional in many other cases, e.g., *Keyes* v. *School District No. 1, supra,* at 201-2; *Booker* v. *Special School District,* D. Minn. 1972, 351 F. Supp. 799, 804, 808; *Bradley* v. *Milliken,* E.D. Mich. 1970, 338 F. Supp. 582, 587-88, 593, *aff'd* 6 Cir. 1972, 484 F.2d 215; *Spangler* v. *Pasadena Board*

[51] Remoteness in time has no relevance to the issue of intent. "If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional' ". *Keyes* v. *School District No. 1, Denver, Colo., supra,* at 210.

of Education, C.D. Cal. 1970, 311 F. Supp. 501, 508, 520, 522; *Taylor* v. *Board of Education,* S.D. N.Y. 1961, 191 F. Supp. 181, 184-5, 192, 194, *aff'd* 2 Cir. 1961, 294 F.2d 36, 38. In five of the categories of defendants' activities, described in divisions I-V, *ante,* the court concludes on the basis of evidence within each category that the defendants were acting with segregative intent. Only in division VI, *ante,* on Examination and Vocational Schools and Programs, has the court relied upon the burden-shifting principle discussed in the *Keyes* case at 208-210. However, this principle is applicable generally and would be available to buttress the conclusions in divisions I-V if need be. The segregative consequences of many of the defendants' actions were scarcely contested, but were argued by the defendants to have been unforeseeable or beyond the defendants' power to prevent. The court has generally rejected these defenses for reasons stated either within numbered divisions of the opinion or in the part entitled Residential Segregation and Neighborhood Schools.

On the issue whether substantial portions of the system have been intentionally segregated by the defendants, the court concludes that they have. Plaintiffs have proved that the defendants intentionally segregated schools at all levels, e.g., secondary English, intermediate Lewenberg and elementary Hennigan; built new schools for a decade with sizes and locations designed to promote segregation; maintained patterns of overcrowding and underutilization which promoted segregation at 26 schools; and expanded the capacity of approximately 40 schools by means of portables and additions when students could have been assigned to other schools with the effect of reducing racial imbalance. How many students were intentionally separated on a racial basis cannot be stated with any degree of precision; but the annual totals were certainly in the thousands, including graduates of nine K-8 elementary

schools and four middle schools by means of feeder patterns manipulated by the defendants, students attending most high schools and several junior highs by the same means, students making imbalancing transfers under the open enrollment policy and exceptions to the controlled transfer policy, students transported to perpetuate segregation, and students at schools identifiably black by means of assignment and transfer policies regarding faculty and staff. As explained in the *Keyes* case, at 201-202, segregative practices like these have obvious reciprocal effects. For example, by using feeder patterns to channel black students to English, defendants not only concentrated black students there but also made high schools which the black students might otherwise have attended more predominantly white. Similarly every segregative transfer under open enrollment or an exception to the controlled transfer policy, whether by a white or black student, increased segregation in the sending school as well as in the receiving school.

Finally, defendants did not "adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions", *Id.*, at 210; nor produce "evidence supporting a finding that a lesser degree of segregated schooling" in any part of the system would not have resulted even if they had not acted as they did, *Id.*, at 211; nor demonstrate that any area of the city "is a separate, identifiable and unrelated section of the school district that should be treated as isolated from the rest of the district", *Id.*, at 213. In many instances defendants' evidence consisted of "allegedly logical, racially neutral explanations for their actions", *Id.*, at 210, which proved to be rationalizations. In view of the plaintiffs' proof of the defendants' pervasive practices which were intentionally segregative and their direct and reciprocal effects, the court concludes that the defendants'

actions had a segregative impact far beyond the schools which were the immediate subjects of their actions. Indeed plaintiffs' evidence showed, independently of reciprocal effects, that some of defendants' practices had a segregative impact on entire levels of the school system. The court concludes that the defendants have knowingly carried out a systematic program of segregation affecting all of the city's students, teachers and school facilities and have intentionally brought about and maintained a dual school system. Therefore the entire school system of Boston is unconstitutionally segregated. Accordingly, the court will contemporaneously with this opinion file a partial judgment permanently enjoining the city defendants from discriminating upon the basis of race in the operation of the Boston public schools and ordering that they begin forthwith the formulation and implementation of plans to secure for the plaintiffs their constitutional rights.

Remedial Guidelines

It is time to turn to the future. Henceforth the defendants are under an "affirmative obligation" to reverse the consequences of their unconstitutional conduct. *Green* v. *County School Board,* 1968, 391 U.S. 430; *Raney* v. *Board of Education,* 1968, 391 U.S. 443. Neutral conduct is no longer constitutionally sufficient. *Keyes* v. *School District No. 1, Denver, Colo., supra,* at 200, n. 11. The defendants must eliminate all vestiges of the dual system "root and branch", *Green, supra,* at 438.

In order to assist the defendants in carrying out their obligations, the court will outline several remedial principles which the Supreme Court has declared to be constitutionally applicable. First, the obligation of the defendants is to proceed now to secure the rights of the plaintiffs. *Green, supra,* at 439. In ascertaining compliance with this obligation, "a school authority's remedial plan . . . is to be judged by its effectiveness." *Swann* v. *Charlotte-*

Mecklenburg Board of Education, 1971, 402 U.S. 1, 25. Thus, compliance requires desegregation and the goal is to dismantle the dual system. *Id.* at 28.

Second, the primary responsibility for desegregation lies with the school committee. *Brown* v. *Board of Education,* 1955, 349 U.S. 294, 299 (*Brown II*). If, in fulfilling this responsibility, policy preferences hinder or obstruct the conversion to a unitary school system, they "must give way [since they would] hinder vindication of federal constitutional guarantees." *North Carolina State Board of Education* v. *Swann,* 1971, 402 U.S. 43, 45. This means that a preference not to bus, or for neighborhood schools, or any other policy preference, can be validly maintained only if it will not interfere with the defendants' constitutional duty to desegregate. Also "these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown II, supra,* at 300. No amount of public or parental opposition will excuse avoidance by school officials of constitutionally imposed obligations.

Third, "school authorities are 'clearly charged with the affirmative duty to take whatever steps might be necessary,' " *Swann, supra,* at 15, quoting *Green, supra,* at 437. This means that busing, the pairing of schools, redistricting with both contiguous and non-contiguous boundary lines, involuntary student and faculty assignments, and all other means, some of which may be distasteful to both school officials and teachers and parents, must be evaluated; and, if necessary to achieve a unitary school system, they must be implemented. The Supreme Court has recognized that "[t]he remedy for segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided . . . when remedial adjustments are being made to eliminate

the dual school systems." *Swann, supra,* at 28. The Supreme Court has also indicated that the non-use of a more effective plan may indicate a "lack of good faith" on the part of the defendants, and any such preference places a heavy burden of justification upon them. *Green, supra,* at 439. With these principles in mind, the difficulty and duration of future proceedings can be kept to a minimum.

Fourth, the Supreme Court has said, "Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations." *Swann, supra,* at 25. In Boston the public school population is approximately two-thirds white and one-third black; ideally every school in the system would have the same racial proportions, although as a practical matter there is no prospect of achieving this 2:1 ratio in every school. The Court has also pointed out that with desegregation plans which leave any schools all or predominantly one race, white or black, the defendants must carry the burden that such treatment is genuinely nondiscriminatory. *Id.* at 26. More specifically, the Court has pointed out that "the nature of the violation determines the scope of the remedy." *Id.* at 16. Thus, where the defendants have been found to have committed discriminatory acts as to a specific school facility, certainly no plan which ultimately leaves the racial identifiability of that facility untouched will be constitutionally sufficient.

Fifth, such time as the court allows for formulation and implementation of plans to desegregate Boston's schools will be granted at the cost of continuing the denial of the plaintiffs' rights under the Constitution. For this reason the time allowed for compliance must be only that reasonably necessary to design and evaluate plans to be presented to the court and thereafter only the time reasonably necessary, administratively, to implement the plan which is ultimately approved by the court. The Supreme Court has

decreed that "[t]he burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date." *Brown II*, *supra*, at 300.

The remedies to be ordered by the court will be affected in this case by the pending, current implementation by the defendants of a racial imbalance plan designed by the state board and forced upon the city defendants by orders of the Supreme Judicial Court entered on January 16, March 22 and April 17, 1974. The state court plan is scheduled to take effect on the opening day of school in September 1974. Our understanding is that this plan will reduce the number of majority black schools from 68 to 44 and the number of black children attending imbalanced schools from approximately 30,000 to approximately 10,000. The state plan relies on two of the traditional methods, redistricting and busing. The plan also removes one of Boston's structural obstacles to integration by converting the entire system, except for McKay junior high in East Boston, to the middle school design, i.e., all students entering the sixth grade will be in a middle school and all students entering the nith grade will be in a high school except at McKay. Under the state board plan, Boston's high schools, except for the three examination schools, are given districts for the first time, thus eliminating many discriminatory feeder patterns. Finally, busing will be used to reduce segregation; state officials predict that approximately 6,000 students will be bused for this reason, but city officials estimate that the number will be closer to 20,000. These and other aspects of the state plan will be explored at the hearing scheduled by separate notice for June 27, 1974 in the context of the court's separate partial judgment and interlocutory order, attached hereto as Appendix A.

(s) W. Arthur Garrity, Jr.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-911-G
TALLULAH MORGAN ET AL.,
PLAINTIFFS,
v.
JAMES W. HENNIGAN ET AL.,
DEFENDANTS.

PARTIAL JUDGMENT AND INTERLOCUTORY ORDER

June 21, 1974

GARRITY, J. This action came on for trial before the court, and the issues having been duly tried and a decision having been duly rendered, as set forth in an opinion filed herewith, that the rights of the plaintiff class of black students and parents under the Fourteenth Amendment to the Constitution of the United States have been and are being violated by the defendants in their management and operation of the public schools of the City of Boston,

Partial Judgment

It is ORDERED and ADJUDGED that the defendants John J. Kerrigan, chairman, Paul Ellison, John J. McDonough, Kathleen Sullivan and Paul R. Tierney, who are the members of the Boston School Committee, and William J. Leary, Superintendent of Schools of the City of Boston, their officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with them who receive actual notice of this judgment and order, be permanently enjoined from discriminating upon the basis of race in the operation of the public schools of the City of Boston and from creating, promoting or main-

taining racial segregation in any school or other facility in the Boston school system; and said defendants are further ORDERED to begin forthwith the formulation and implementation of plans which shall eliminate every form of racial segregation in the public schools of Boston, including all consequences and vestiges of segregation previously practiced by the defendants.

Interlocutory Order

It is further ORDERED that, pending further order or unless specific leave of this court is obtained, said defendants be preliminarily enjoined from:

(a) failing to comply in any respect with the Racial Imbalance Act plan ordered by the Supreme Judicial Court of Massachusetts to be implemented on or before the opening day of school in September, 1974;

(b) beginning the construction of any new school or expansion or the placement or any new portable;

(c) granting transfers of white teachers from schools with majority black enrollments or black teachers from schools with majority white enrollments;

(d) granting transfers under exceptions to the controlled transfer policy.

Dated at Boston, Massachusetts, this 21st day of June, 1974.

(s) W. ARTHUR GARRITY, JR.
United States District Judge

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In the
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1190

KEVIN H. WHITE,
as he is Mayor of the City of Boston, et al.,
Petitioners,

v.

TALLULAH MORGAN, et al.,
JOHN J. KERRIGAN, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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CITY OF BOSTON PRINTING SECTION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. ———

KEVIN H. WHITE,
as he is Mayor of the City of Boston, et al.,
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TALLULAH MORGAN, et al.,
JOHN J. KERRIGAN, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners Kevin H. White, as he is Mayor of the City of Boston, Massachusetts, Edward T. Sullivan and Barbara G. Cameron, as they are Public Facilities Commissioners of the City of Boston, and Robert J. Vey, as he is the Director of Public Facilities of the City of Boston, hereinafter referred to as "the City Petitioners", respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this matter on December 19, 1974.

OPINIONS BELOW

The December 19, 1974, opinion of the United States Court of Appeals for the First Circuit, as yet unreported, is reprinted as Appendix A to the Petition for Writ of Certiorari being filed by the Boston School Committee, at pages 1 to 34. The June 21, 1974, opinion of the United States District Court for the District of Massachusetts, reported at 379 F. Supp. 410 (D. Mass. 1974), is reprinted as Appendix C to the Boston School Committee's Petition, at pages 36 to 173.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). Jurisdiction in the District Court was found under 28 U.S.C. §1343(3).

The City Petitioners were parties to the District Court proceedings prior to the judgment and opinion of the Court of Appeals. City Petitioners Sullivan, Cameron, and Vey were made additional parties defendant by oral order entered by the District Court on September 6, 1974, as to the issue of school construction. Mayor White was named an additional party defendant by order of the District Court, entered September 30, 1974 (a copy of which is reprinted as Appendix A to this Petition), as to issues concerning public safety, security, and financial aspects of implementation of desegregation.

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct by holding as a matter of law that *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973), requires the Boston School Committee to make a positive showing of integrative intent in order to rebut the presumption relied upon by the District Court that segregative intent exists throughout the entire Boston Public School system?

2. Whether the presumption established in *Keyes* v. *School Dist. No. 1* which allows a District Court to characterize a school system as a totally segregated "dual" system upon a finding of segregative activity affecting only a part of that system has been abrogated by the rule stated in *Milliken* v. *Bradley*, 418 U.S. 717 (1974), that a remedy in a school desegregation case must not exceed the scope of proven Constitutional violations?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Plaintiffs below (hereinafter Plaintiffs) brought this action on March 25, 1972, against the Boston School Committee, its individual members, and the Superintendent of the Boston

Public Schools (hereinafter the School Committee), and against the Board of Education of the Commonwealth of Massachusetts, its individual members, and the Commissioner of Education of the Commonwealth of Massachusetts, seeking declaratory and injunctive relief against alleged racial discrimination in the operation of the Boston Public Schools. Plaintiffs, who were later certified as proper representatives of a class of all black children enrolled in the Boston Public Schools and their parents, sought relief for alleged violations of the Thirteenth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §§1981, 1983, and 2000d.

The School Committee generally denied Plaintiffs' allegations, arguing that the uneven proportions of blacks and whites in the schools were due to residential settlement patterns and the policy of providing neighborhood schools.

On June 21, 1974, the District Court (Garrity, J.) found that "defendants have knowingly carried out a systematic program of segregation affecting all of the city's students, teachers and school facilities and have intentionally brought about and maintained a dual school system." (App. C, p. 170.) The District Court relied upon the presumption established in *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973), that a school system which is substantially and intentionally segregated is a completely dual system, and is thereby subject to complete dismantling, "root and branch," as prescribed in *Green* v. *County School Board*, 391 U.S. 430, 438 (1968).

The District Court's Partial Judgment enjoined the School Committee "from discriminating on the basis of race in the operation of the public schools of the City of Boston" and ordered the School Committee "to begin forthwith the formulation and implementation of plans which shall eliminate every form of racial segregation in the public schools of Boston,

including all consequences and vestiges of segregation previously practiced by the defendants." (App. D, pp. 174–175.) Further, by Interlocutory Order the District Court enjoined the School Committee from "failing to comply in any respect with the Racial Imbalance Plan ordered by the Supreme Judicial Court of Massachusetts to be implemented on or before the opening day of school in September, 1974. . . ." (App. D, p. 175.)[1]

The District Court also enjoined the construction of any new school or expansion or the placement of any new portable school, the transfer of white teachers from schools with majority black enrollments or the transfer of black teachers from schools with majority white enrollments, and the granting of any student transfers under exceptions to the controlled transfer policy. (App. D, p. 175.)

The School Committee appealed to the United States Court of Appeals for the First Circuit. On December 19, 1974, the Court of Appeals issued its decision (App. A, pp. 1–34) and Judgment (App. B, p. 35) which affirmed the Judgment of the District Court. The Court of Appeals upheld the findings of substantial segregation with intent in five areas of the school system: (1) facilities utilization and new structures; (2) districting and redistricting; (3) feeder patterns; (4) open enrollment and controlled transfers; and (5) faculty and staff hiring and assignments. (App. A, pp. 10–23, 27–33.) In the sixth area, vocational and examination schools, the Court of Appeals upheld the finding of segregation in those schools and applied the *Keyes* presumption that where a substantial

[1]The Supreme Judicial Court-ordered plan was the result of litigation between the State Board of Education and the School Committee in Massachusetts state courts with respect to the state's efforts to force the School Committee to comply with the Massachusetts Racial Imbalance Law, St. 1965, c. 641, as amended. (App. C, pp. 44–48.)

portion of a school system is intentionally segregated and another part is found to be segregated, intent will be presumed with respect to the latter part. (App. A, pp. 23–27.)

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted Because The Court Of Appeals Has Wrongly Interpreted This Court's Decision In *Keyes* v. *School Dist. No. 1* So That Rebuttal Of The Presumption Of Segregative Intent Can Be Achieved Only By A Positive Showing Of Integrative Intent.

The Court of Appeals erred in establishing an excessively strict burden of proof to rebut the presumption of segregative intent with respect to the examination and vocational schools in Boston. (App. A, pp. 23–27.) The Court of Appeals apparently relied upon the language of this Court in *Keyes* that "where a meaningful portion of the system is found to be intentionally segregated, the existence of subsequent or other segregated schooling within the same system justifies a rule imposing on the school authorities the burden of proving that this segregated schooling is not also the result of intentionally segregative acts." 413 U.S. 189, 210.

The Court of Appeals erroneously modified that presumption when it said that "little short of a positive showing that defendants acted with *integrative* intent would suffice to rebut the presumption of segregative intent." (App. A, p. 26, n. 21.) The City Petitioners urge that this is a significant and unwarranted extension of the *Keyes* presumption.

The Court of Appeals held the School Committee to that burden with respect to the examination and vocational schools, despite the showing at the trial that substantial modifications had been made for admission to the examination schools and that admission to the vocational schools was voluntary. The

changes in the selection system to the examination schools came with a 1972 consent decree between the Massachusetts Commission Against Discrimination and the School Committee, which provided that future admissions be based solely upon Secondary School Admission Tests (SSAT) administered by the Educational Testing Service (ETS) and an allocation of 112 seats annually to underrepresented districts. (See App. C, pp. 141–42.) The District Court made no finding that this new system resulted in or was leading to segregation. Further, the School Committee had retained ETS to evaluate the use of the nationally used SSAT for possible segregationist effect, as was shown with a different test in *Hobson* v. *Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, *Smuck* v. *Hobson*, 408 F. 2d 175 (D.C. Cir. 1969).

The presumption is especially inappropriate in this case where the isolation of the examination and vocational schools is not geographical, as it was for the Park Hill schools in *Keyes*, but is structural and organizational. The examination and vocational schools, because of their different programs and student admissions policies, are as different from the rest of the Boston Public School system as a private school is from a public school. "[The examination schools] offer excellent college preparatory instruction and their graduates matriculate at the nation's finest colleges and universities. . . ." (App. C, p. 139.) The presumption, as applied to Boston by the Court of Appeals, makes even less sense than when applied to geographically isolated parts of a school system.

The City Petitioners recognize that even if the findings of segregation in the examination schools were in error, precedent from this Court indicates a strong unwillingness to overturn findings of fact by lower courts. *E.g.*, *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211 (1948). We assert, however, that the evidence of changed procedure agreed

to by the state commission against discrimination meets the burden of proof required by *Keyes* to rebut the presumption of segregative intent.

Moreover, the burden of "little short of . . . integrative intent" is almost impossible to meet in any real situation, and especially in a large city such as Boston with its many ethnic neighborhoods. (See the map of the City of Boston, Appendix B to this Petition.) The Court of Appeals standard demands behavior not mandated by the Fourteenth Amendment and illustrates the danger foreseen by Mr. Justice Rehnquist in his dissenting opinion in *Keyes*, who stated:

> "To require that a genuinely 'dual' system be disestablished, in the sense that the assignment of a child to a particular school is not made to depend on his race, is one thing. To require that school boards affirmatively undertake to achieve racial mixing in schools where such mixing is not achieved in sufficient degree by neutrally drawn boundary lines is quite obviously something else." 413 U.S. 189, 258.

In explicitly imposing a duty to integrate, where *Keyes* only established a burden to show absence of segregative intent, the Court of Appeals has imposed, in practical effect, an irrebuttable presumption of segregative intent where segregation is found in any part of a system which contains some evidence of intentional segregation. Irrebuttable presumptions are disfavored by this Court. *See Vlandis* v. *Kline*, 412 U.S. 441, 446–48 (1973). Such a presumption puts the courts in the position of requiring conduct which is not required by the Constitution, and in so doing the courts exceed the judicial powers conferred upon them under Article III of the Constitution.

In substantially expanding the *Keyes* presumption, the Court of Appeals has decided an important federal question in conflict with this Court's conclusion in *Keyes*.

II. Certiorari Should Be Granted In Order That This Court Can Reconcile Its Decisions In *Keyes* v. *School Dist. No. 1* And *Milliken* v. *Bradley* As To The Extent To Which The Presumption Of A Dual School System Can Be Utilized In A Single School System Case.

The doctrines announced by this Court in *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973), and *Milliken* v. *Bradley*, 418 U.S. 717 (1974), if left unreconciled, suggest that a double standard is being imposed for proof of unconstitutional segregative activity with respect to schools. If the defendant is a single school system, as in *Keyes*, plaintiff need only prove segregative activity with respect to a substantial part of that system in order to have the entire system characterized as "dual." The characterization of a school system as "dual" subjects each and every school within that system to the gamut of remedial measures available to the district court. However, if the defendant is a metropolitan region containing several school systems, as in *Milliken*, the plaintiff must show, unaided by the presumption announced in *Keyes*, actual segregative activity in a particular part of the metropolitan region before that part may be required to participate in the desegregation remedy.

The Court has justified the presumption established in *Keyes* by noting that "common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are subjects of those actions." *Keyes*, *supra* at 203. It would seem to be just as much a part of common sense that racially-inspired actions with respect to central city schools have an impact beyond the central city and contribute to the racial identifiability of suburban schools. Yet the Court, in *Milliken*, refrained from utilizing such a presumption, thereby suggesting that the mere

presumptive implication of certain schools or parts of an area does not justify extension of equitable corrective measures to such parts or schools. In short, the Court has suggested either that the *Keyes* presumption has been abrogated, or that municipal boundaries are more important than the Constitution of the United States.

If the *Keyes* presumption has survived *Milliken*, its application only to single school systems, especially to a school system so bizarre geographically as Boston's, appears inequitable. Parts of Boston are separated by many miles and bodies of water from the area of the City of minority concentration. Such neighborhoods would be unlikely, even given a purely neutral and natural pattern of ethnic group dispersion, to have a significant minority population. Yet, merely because such neighborhoods are part of the same jurisdiction, they must participate fully in the desegregation remedy, because the entire system has been characterized as "dual" by application of the *Keyes* presumption.

On the other hand, certain suburban municipalities much closer than parts of the City to the area of minority concentration, have virtually all-white populations, contrary to what could be expected given a purely neutral and natural pattern of ethnic group dispersion. Yet these municipalities are immune from any participation in the desegregation remedy, because this Court recognizes no presumption strong enough to enable the District Court to leap across municipal boundaries as it did to enable the District Court to leap across miles of city space and bodies of water within the City.

Such disparate treatment of neighborhoods in the central city and neighborhoods in abutting suburbs is perceived by those who must adjust to the necessity of desegregation as grossly unfair. This Court, as the highest court of equity,

should address this problem and thereby assist in the vindication of Constitutional rights, a goal which can be attained ultimately only by popular acceptance of the Constitutional mandate of equal educational opportunity for all, and not by mere juxtaposition of peoples of different races. Popular acceptance is impeded, if not precluded, as long as the people perceive — whether correctly or not — that this Court has utilized a double standard of justice when dealing with city and suburban neighborhoods. In short, this Court should reconcile *Keyes* and *Milliken* by announcing a uniform standard for proving liability for unconstitutional segregative activity with respect to schools.

CONCLUSION

The City Petitioners have a compelling interest in a precise determination of the violation of law because of the implications this issue has for the final determination of the remedy in the District Court proceedings. This Court has often stated that "the nature of the violation determines the scope of the remedy." *E.g.*, *Milliken* v. *Bradley*, 418 U.S. 717, 738 (1974), quoting *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). The City Petitioners urge that since the "federal remedial power may be exercised 'only on the basis of a constitutional violation' ", *Milliken*, *supra* at 738, again quoting *Swann*, *supra* at 16, the District Court should restrict the scope of its remedies to the point of actual findings of constitutional violations rather than presumed findings.

This Court has observed that the "reconciliation of competing values in a desegregation case is, of course, a difficult task. . . ." *Swann*, *supra* at 31. That reconciliation becomes more difficult when parts of a school system not involved in the violation are forced to comply with the remedy.

Although the question of remedy is not yet precisely before this Court, the City Petitioners are concerned that without a decision of this Court as to the nature of the violation, others might later argue that the issue as to liability raised in this Petition would be foreclosed when that remedy stage comes. Therefore, we urge that the nature of the violation be more explicitly stated now in view of the high fiscal, educational, and public safety burdens of the expected remedy.

Accordingly, a Writ of Certiorari should issue to the Court of Appeals in this case because of the substantial importance of this controversy to the citizens of Boston and other cities, and because the decision of the Court of Appeals is in conflict with the previous holdings of this Court.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TALLULAH MORGAN ET AL.,
PLAINTIFFS
v.
JOHN KERRIGAN ET AL.,
DEFENDANTS
} Civil Action No. 72-911-G

ORDER JOINING KEVIN H. WHITE, AS HE IS MAYOR, AS A PARTY DEFENDANT

September 30, 1974

GARRITY, J. After hearing, the motion of the city defendants to join Kevin H. White, as he is Mayor of the City of Boston, as a party defendant is granted for certain specific purposes, as follows:

1. The Mayor will be joined as a party defendant as to issues concerning the safety and security of the people of the City of Boston as they are affected by the implementation of the court's desegregation order. In this connection the Mayor's responsibility for the police department and other related services and departments needed to effect peaceful implementation of the court's order makes joinder desirable and probably essential to effect complete relief to all the parties.

2. The Mayor will be joined as a party defendant as to issues concerning the financial aspects of implementation of desegregation. The Mayor's control of the financial departments involved in funding of implementation of the court's orders makes joinder desirable and probably essential to afford complete relief to all the parties.

3. With respect to other aspects of the court's order, including proposals relating to long-range desegregation plans, the primary responsibility of the City of Boston for these matters is placed with the original city defendants, the Boston School Committee and Superintendent. Therefore, the court will entertain such proposals from the Mayor only after they have been presented to the school committee. If, after reasonable opportunity for consideration by the school committee, the school committee does not adopt such proposals or present them to this court through its counsel, the court will on application hear any such proposals or other motions from the Mayor.

4. As appropriate, the court retains the power to add to or modify the provisions of this order.

(s) W. ARTHUR GARRITY, JR.
United States District Judge.

SUPREME COURT, U. S.

FILED

APR 17

MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1188

JOHN J. KERRIGAN, ET AL.,
PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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In the
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1188

JOHN J. KERRIGAN, ET AL.,
PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Questions Presented

1. Are black public school students denied equal protection by school officials who engage in courses of action (including both the adoption of certain measures and the

rejection of others) that are intended to, and do, produce and maintain racial segregation of students and faculty in the system's schools?

2. Should this Court review comprehensive findings of fact which the Court of Appeals found on a voluminous record to be clearly correct (App. 16)?

Statement of the Case

This petition seeks review of findings, concurred in by two lower courts, that the Boston schools are racially segregated in violation of the Fourteenth Amendment. Only issues concerning the existence and scope of this constitutional violation are involved; remedial orders are still pending below.

Both students and teachers are segregated in the Boston public schools. At least 80% of the schools have student racial compositions sharply out of line with the composition of the system as a whole (App. 56).[1] Similarly, over two-thirds of the system's few black teachers are in majority black schools, although less than one-third of the schools are majority black (App. 123).

The District Court (Garrity, J.) found that this segregation was the result of many intentionally segregatory acts by the School Committee (petitioners here) (App. 167), amounting to a "knowing" and "systematic program of segregation" (App. 170). This finding was based on detailed factual analysis (App. 41-161), the testimony of thirty witnesses, and more than 1,000 exhibits (App. 3-4). The Court of Appeals (Coffin, C.J.), after a thorough review of the record (App. 10-33), affirmed the District Court decision and stated that "the district court gave the most deliberate and sensitive attention to this traumatic

[1] Citations to "App." refer to the appendix to the petition.

issue. More pertinently, in the light of the ample factual record and the precedents of the Supreme Court, *we do not see how the court could have arrived at any other conclusion*" (App. 34; emphasis added). These findings that the Fourteenth Amendment was violated in the Boston schools by deliberate segregation echoed similar conclusions reached in more than a dozen Northern cities. See App. 2 n. 1.

Only by reading the opinions of the Court of Appeals (App. 1-34) and District Court (App. 37-173) can the massive, interconnecting evidence of segregatory intent and effect, and the careful treatment it received from the lower courts, be appreciated. Such reading reveals, for instance, that the finding of segregatory intent reached here was supported by actual statements of school officials to an extent unusual in school segregation cases (App. 61, 63-64, 84 n. 19, 102-03, 107-09, 114, 166-67). It also reveals numerous segregatory acts implementing that intent, summarized below in part I(B) of this brief. And it reveals that the petition's statement of facts (pp. 7-8) is squarely at odds with the findings when it asserts that petitioners made no segregatory district changes (compare App. 19, 73 & n. 61, 81), that the majority of petitioners' changes in feeder patterns have been integrative (compare App. 87-104), and that Brighton is politically isolated from Boston (Compare App. 53, 155-57, and especially 156 n. 47). No more reliable are the suggestions that petitioners have been absolved by the Massachusetts Supreme Judicial Court of noncompliance with the state's racial imbalance law (petition p. 8; compare App. 44-47), that petitioners had no say in the selection of sites for new schools (petition p. 13; compare App. 13, 65, 84 n. 19, 149, 152, 158-59; Mass. St. 1966, c. 642 sec. 4), and that the petitioners' student transfer policies encompassed no affirmative segre-

gatory act (petition, p. 25; compare App. 105-06, 108-09, 114-16).

The lower courts' findings coincide with those reached in other cases dealing with the Boston schools. An HEW Administrative Judge, affirmed by the HEW reviewing authority, upheld charges by HEW, HUD and other agencies that the Boston schools are *de jure* segregated in violation of 42 U.S.C. sec. 2000d (App. 48-51). The Massachusetts Commission Against Discrimination found that the school system's "open enrollment" policy was administered discriminatorily on the basis of race, and these findings were upheld by the Superior Court (App. 105-07). And during the School Committee's campaign of delay and obstruction against the Massachusetts Racial Imbalance Act (App. 44-47, 84 n. 19, 160), state courts have made findings (App. 42 n. 3, 46, 69, 70-71) which parallel those of the District Court. The desegregation plan in effect in Boston this year was originally imposed in Massachusetts Supreme Judicial Court proceedings under the Act (App. 44-47) and was adopted by the District Court as part of an interim remedy (App. 174-75).

Summary of Argument

The legal standard followed by both lower courts was precisely the one approved in *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973), and applied in numerous "Northern" cases relied on by the courts here. Neither court stated or implied, as alleged, that mere failure to relieve "de facto" segregation is unconstitutional (part I(A)). The findings establish "many actions" (App. 167) by school officials with the intent and effect of segregating the Boston schools (part I(B)). The lower courts relied on evidence of refusals to act by the petitioners only insofar as such refusals were found to be part of a more

inclusive segregatory scheme, or tended to rebut petitioners' defense or establish their intent (part I(C)). The petition's challenge to detailed comprehensive findings of fact which the Court of Appeals uniformly approved should not be heard by this Court (part II(A)), and is entirely unfounded (part II(B)).

Argument

I. The Lower Courts Applied the Correct Legal Standard.

A. *The Standard Stated by the Lower Courts Was Correct.*

The Court of Appeals correctly stated (App. 8) that "The controlling test is that propounded in *Keyes*, where the relevant inquiry is described as an effort to determine whether the authorities' 'policies and practices . . . were . . . taken in effectuation of a policy to create or maintain segregation.' 413 U.S. at 213-14." The Court had previously rejected the theory that mere *de facto* segregation not created or maintained by intentional state action must be eradicated. *Springfield School Committee* v. *Barksdale*, 348 F.2d 261, 264 (1 Cir. 1965). At the outset of its opinion in this case it recognized that it was concerned with "a school system segregated by the deliberate design of local school authorities" (App. 4); and it nowhere even intimated that anything less would establish a violation.

Accordingly, the Court considered the "foreseeable racial impact" of School Committee decisions (App. 13, 22); it observed that "the defendants took every opportunity to maintain segregation where it existed and to foster segregation where it did not" (App. 22); and it concluded that "even if the individual instances were not by them-

selves capable of supporting a finding of discriminatory intent — and we think those addressed were sufficient — they clearly create a definite pattern of intentional segregatory motives and practices" (App. 22). And it carefully considered (e.g., App. 6-7, 13, 16, 30) claims that segregatory effects resulted from external causes, or were not intended, or were educationally justified.

The District Court likewise stated the correct legal standard. It defined its task (App. 58) as determining "whether the defendants have intentionally and purposefully caused or maintained racial segregation in meaningful or significant segments of the Boston system". And after meticulous consideration of the facts (App. 58-157) and the law (App. 145, 161-65), it concluded (App. 167) that "the defendants took many actions in their official capacities with the purpose and intent to segregate the Boston public schools and that such actions caused current conditions of segregation in the Boston public schools." The plaintiffs, of course, had not charged that de facto segregation is unconstitutional,[2] but "alleged that the city defendants have intentionally brought about and maintained racial segregation . . . by various actions" (App. 38).

The Court of Appeals' language quoted by the petition (p. 9) does *not* assert that mere de facto segregation is unconstitutional, but simply says that intentional state action *maintaining* a segregated school system is as unconstitutional as such action *creating* it. This was correct: the state's resources and prestige may not be enlisted to preserve segregation even though the segregation may have originated elsewhere. E.g., *Keyes* v. *School District No. 1,* 413 U.S. 189, 199, 211, 214 (1973); *Norwood*

[2] For the purposes of this case, plaintiffs thus make the same concession made in *Keyes* v. *School District No. 1*, 413 U.S. 189, 198 (1973).

v. *Harrison*, 413 U.S. 455, 463-67 (1973); *Robinson* v. *Florida*, 378 U.S. 153, 156-57 (1964); see *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 177-79 (1972); *Shelley* v. *Kraemer*, 334 U.S. 1, 13-14, 19-20 (1948); *Reitman* v. *Mulkey*, 387 U.S. 369 (1967).

The lower courts thus correctly required evidence of state action intentionally creating or maintaining segregation — and, as will appear below (part I(B)), found it in plenty. The petition's claim that, regardless of what the courts said, they in fact held unconstitutional mere failure to remove de facto segregation will be discussed in section I(C) below; all that is asserted here is that both courts below clearly stated the correct constitutional standard.

B. *Numerous Acts Intentionally Creating and Maintaining Segregation Were Found.*

Even a brief summary of the District Court's findings, which the Court of Appeals held to be the only proper ones on this record (App. 34), shows that the District Court did not exaggerate when it concluded (App. 167) that "many actions" intentionally promoting segregation had been proven. Each of the following acts was found by the District Court, and is indistinguishable from segregatory acts relied on by other courts in other cases.

1. The petitioners' assignment practices packed white students into overcrowded white schools rather than placing them in black schools with free space, for reasons which were explicitly racial (App. 59-62). One hundred percent white South Boston High, for instance, was overenrolled by more than 500 students and needed an additional building (App. 59-60, 111) — but the petitioners admitted hundreds of white students from other parts of the city to South Boston High (App. 157). School officials admitted that they continued to admit students to

South Boston High rather than placing them in black schools with vacant seats because they thought that white parents would protest such assignments (App. 61, 81). The defendants had acted against overcrowding when this could be done without reducing segregation but rejected proposals to relieve evercrowding which would have had integratory effects (App. 61-62). E.g., *Booker* v. *Special School District No. 1, Minneapolis,* 351 F. Supp. 799, 808 (D. Minn. 1972).

2. The petitioners placed more than 40 portable classrooms at white schools, thus enabling themselves to continue admitting and assigning white students to those schools, instead of to empty seats elsewhere. School officials hurried along such placement in white South Boston where "there would be no question regarding the racial imbalance question" — but simultaneously rejected proposals to use portables where they would reduce segregation on the ground that relocatables are educationally undesirable and expensive (App. 62-64). E.g., *Keyes* v. *School District No. 1,* 413 U.S. 189, 193, 202 (1973); *Oliver* v. *Michigan Bd. of Educ.,* 508 F.2d 178, 184 (6 Cir. 1974).

3. Of 20 new schools or annexes which the petitioners acquired without State aid and therefore without a requirement of State approval, 18 opened more than 50% black or less than 15% black (App. 64-65). The petitioners systematically located small schools in or near segregated public housing projects, so that the schools were also segregated (App. 148-52). E.g., *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 20-21 (1971); *Milliken* v. *Bradley,* 418 U.S. 717, 726, 738 n. 18 (1974).

4. One of the schools referred to in the previous paragraph, the Weld, was opened only 7% white although located in an overwhelmingly white area: the defendants bused in blacks, without seeking their parents' permis-

sion, without making use of vacant seats in white schools which were at least as conveniently located, and without assigning nearby white students (except visually handicapped students); and this practice stopped only after the present suit was brought and outside officials objected. (App. 65-66.) *Milliken, supra,* 418 U.S. at 725, 738 n. 18; *Clemons* v. *Bd. of Educ.,* 228 F.2d 853 (6 Cir.), *cert. denied,* 350 U.S. 1006 (1956).

5. Even among schools built with State aid, as to which there was heavy State pressure to build integrated schools, the petitioners tried with some success to build segregated schools. (App. 152.) After obtaining State aid by promising to open racially balanced facilities, the petitioners repeatedly failed to adopt feasible ways of reaching that result (App. 66-72). See cases cited in paragraph 3 above.

6. In several instances, involving advanced work classes and the Grover Cleveland School, the petitioners made changes in district lines which promoted segregation (App. 73 & n. 16, 81). E.g., *Keyes, supra,* 413 U.S. at 192, 201; *United States* v. *Board of School Comm'rs of Indianapolis,* 474 F.2d 81, 86 (7 Cir.), *cert. denied,* 413 U.S. 920 (1973). The petitioners had frequently redistricted when this would not reduce segregation. App. 80-81. But they continued to use a districting scheme whose oddly shaped districts made students travel longer distances to segregated schools instead of shorter distances to unsegregated schools, while even schools drawing pupils from the same district varied strikingly in racial composition. App. 74-80. They refused to consider districting changes which would have reduced these segregative features without impairing safety. App. 81-84. When the withholding of State financial aid finally forced the petitioners to agree to redistrict they defaulted on their promise. (App. 84, 87.) E.g., *Milliken* v. *Bradley, supra,* 418 U.S. at 725, 738 n. 18; *Oliver* v. *Michigan Bd. of Educ.,* 508 F.2d 178, 182-84

(6 Cir. 1974); *Cisneros* v. *Corpus Christi Ind. Sch. Dist.*, 467 F.2d 142, 149 (5 Cir. 1972), *cert. denied*, 413 U.S. 920, 922; *Spangler* v. *Pasadena City Bd. of Educ.*, 311 F. Supp. 501, 507-11, 521-22 (C.D. Calif. 1970).

7. The petitioners instituted and repeatedly promulgated feeder pattern regulations which funnelled graduates of black lower schools into three high schools (English, Girls and Burke) which as a result became increasingly and overwhelmingly black, while students were given a variety of options which they exercised to attend white high schools such as South Boston, Charlestown and Hyde Park High. Other feeder patterns created similar results at intermediate level schools. And the petitioners designated several black schools as "middle schools" housing grades 6-8, thus steering their graduates to attend English, Girls and Burke (which were 9-12 grade schools) instead of whiter high schools which started with the 10th grade. App. 87-104. E.g., *Bradley* v. *Milliken*, 484 F.2d 215, 226-27 (6 Cir. 1973), findings as to segregation cited with approval, 418 U.S. 717, 738 n. 18 (1974); *Hart* v. *Community School Bd. of Educ.*, 2 Cir., No. 74-2076 (1/27/75); *Brinkman* v. *Gilligan*, 503 F.2d 684, 695-96 (6 Cir. 1974).

8. The petitioners ran an "open enrollment" transfer program which was discriminatorily administrated,[3] and which implemented not only transfers reducing segregation but those increasing it. After having in 1966, under State pressure, prohibited the latter, segregatory transfers, the petitioners re-instituted such transfers soon afterward with full knowledge of their racial effect, and continued to effect segregatory transfers for five more

[3] At some white schools, transferring black students "encountered locked doors, physical segregation in separate classrooms, auditoriums and corridors and placement in the rear of classrooms. Anticipating the arrival of black students, administrators of some transferee schools had desks unbolted from the floor and removed from classrooms." App. 105.

years. In 1971, State pressure forced the petitioners to abandon this policy, after a lengthy struggle in which the undesirability of forcing white students to stay in black schools was repeatedly invoked by school officials. Even then ways were found to implement segregatory transfers, by means including exceptions to the new policy, constricted readings of the policy deliberately concealed from State officials, and "hardship" transfers granted on feeble or explicitly racial grounds. App. 104-17. E.g., *Milliken, supra,* 418 U.S. 717, 725, 738 n. 18 (optional zones); *Keyes, supra,* 413 U.S. at 202; *Taylor* v. *Bd. of Educ. of New Rochelle,* 294 F.2d 36, 38 (2 Cir. 1961), *cert. denied,* 368 U.S. 940 (1961).

9. More than two-thirds of the school system's few black teachers were assigned to majority black schools, even though less than one-third of the schools were majority black; and the proportion of black teachers so assigned increased over the years. App. 122-24. *None* of the few black principals, assistant principals and assistant headmasters was at a majority white school. App. 124. E.g., *Keyes, supra,* 413 U.S. at 199-200, 202; *Swann, supra,* 402 U.S. at 18-20.

10. Teachers in 80-100% black schools were paid less and averaged less than half the experience of those in 80-100% white schools, and more than twice as many of them were "provisional" teachers considered by the petitioners unqualified for permanent employment; the high rate of teacher turnover in black schools was admitted by school officials to be undesirable. App. 128-32. *Hobson* v. *Hansen,* 327 F. Supp. 844 (D.D.C. 1971); *Spangler* v. *Pasadena City Bd. of Educ.,* 311 F. Supp. 501, 514-15 (C.D. Calif. 1970).

11. Although about 16% of Boston's population was black, and about 33% of the public school students were

black, only 5.4% of the permanent teachers and 3.5% of the administrators employed by the petitioners were black. The petitioners' hiring system relied upon a misuse of the National Teacher Examination against the recommendations of that test's authors and tending to accentuate the tendency (known to school officials) of blacks to do worse on the test than whites. Since appointment to administrative positions was limited to those with many years of Boston teaching experience, those eligible were almost entirely white, so that discriminatory teacher hiring resulted in discriminatory administrator selection. App. 132-35, 137-39. E.g., *Chance* v. *Board of Examiners*, 458 F.2d 1167 (2 Cir. 1972); *Walston* v. *County School Bd. of Nansemond County*, 492 F.2d 919 (4 Cir. 1974).

12. The petitioners ran heavily white high schools offering unique and valuable programs (Boston Latin, Girls' Latin, and Boston Tech), access to which was based on an unvalidated test which admitted between twice and five times as large a proportion of whites as of blacks. The petitioners ran at white high schools (but not at a number of black high schools) particularly valuable vocational programs whose student body and faculty were disproportionately white, and recruitment for which was concentrated at white junior high schools. App. 139-45. E.g., *Berry* v. *School Dist. of Benton Harbor*, 505 F.2d 238, 241-42 (6 Cir. 1974); *Spangler* v. *Pasadena City Bd. of Educ.*, 311 F. Supp. 501, 519-20 (C.D. Calif. 1970).

13. Segregation in the Boston schools was not simply a result of private residential preferences. Housing segregation in Boston was fostered by a variety of government policies, and practices antithetical to a "neighborhood school policy" — such as massive student transportation, schools drawing on the whole system for their students,

and transfer arrangements — pervaded the school system. App. 146-54. E.g., *Keyes, supra,* 413 U.S. at 211-13.[4]

C. *The Lower Courts' Limited Reliance on School Committee Refusals to Act Was Proper.*

The petition's assertion (pp. 8-10) that the lower courts' finding of unconstitutional segregation was based on mere refusal to relieve de facto segregation is incorrect. The courts enunciated no such standard (part I(A) above) and relied on ample evidence of segregatory action (part I(B) above). The petition, indeed, treats as "inaction" practices which the lower court findings show to be anything but that: the placing of portable classrooms at white schools instead of schools where they would have a less segregative effect (petition, pp. 12-13; App. 12, 62-64), the repeated promulgation for segregatory purposes of a transfer policy allowing segregative transfers as well as integrative and neutral ones (petition, pp. 25-26; App. 16-19, 104-17), and teacher assignment policies resulting in teacher segregation (petition, pp. 27-28; App. 28-30, 122-28). The petition's treatment of these and other areas is explicable only on the erroneous theory that state action designed to maintain segregation or implement the segregatory preferences of teachers (who are state agents) and parents is constitutional.

The lower courts did (like other courts considering "Northern" school segregation cases) rely on the petitioners' refusal to act for several specific and wholly proper purposes.

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[4] In the nineteenth century, Boston led the way in departing from the neighborhood school policy, ironically in the context of promoting segregation. *Roberts* v. *City of Boston*, 59 Mass. (5 Cush.) 198, 208-09; M. Weinberg, *Race and Place: A Legal History of the Neighborhood School* 2-7 (1967).

1. Where the petitioners asserted as a *defense* that they had taken measures to integrate schools, the courts rightly investigated whether this was so or whether the petitioners' programs had been all talk and no action. Thus, petitioners have claimed here and below (petition, p. 5; App. 39) that they tried to integrate the Boston schools and could have done no more without violating the Massachusetts Racial Imbalance Act. The District Court properly made findings on these claims, concluding that on the contrary the petitioners persistently struggled to avoid the relief of racial imbalance directed by the Act and that their acts of compliance were insignificant and compelled by outside financial pressure (App. 47-48, 62, 81-87, 152); it is these findings that the petition now attacks (pp. 12, 14-17) as improperly relying on mere inaction. Similarly, the District Court's finding (App. 135-37) that the petitioners' minority recruitment program was a mere pretense—a finding which the petition (pp. 31-32) attacks as reliance on inaction— was among other things a response to the petitioners' own reliance on their recruitment program as a defense against charges of hiring discrimination. City Defendants' Requested Findings of Fact, pp. 25-32 (3/12/73).

2. The lower courts properly relied (e.g., App. 9) on School Committee refusal to act as evidence of the *intent* underlying actions which the Committee did take. Thus, the refusal of the petitioners to place portable classrooms where they would desegregate on the ground that portables are "educationally undesirable" cast illuminating light on their simultaneous eagerness to acquire 45 portables for placement at white schools so as to avoid any need to assign white students to black schools (App. 62-64). The same is true of the petitioners' refusal even to consider desegregative redistricting although they redistricted for segregative and other purposes (App. 80-87).

3. It was eminently proper to consider inaction as part of a "*pattern* of selective action and refusal to act" (App. 13; emphasis added). Creation or preservation of segregation by such a pattern is exactly what is meant by "practices . . . taken in effectuation of a policy to create or maintain segregation" (*Keyes*, 413 U.S. at 214), and is plainly unconstitutional. See *Griffin* v. *County School Bd.*, 377 U.S. 218 (1964) (schools not opened in desegregated county but opened elsewhere); *Lee* v. *Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971) (busing not authorized for desegregation but authorized otherwise); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74 (1886); *Hawkins* v. *Town of Shaw*, 437 F.2d 1286, 461 F.2d 1171 (5 Cir. 1972) (municipal services not provided to black areas but provided to white ones). It is precisely by applying seemingly neutral policies selectively and inconsistently—by reiterating practices where they have preserved segregation, and by revising them where they have not—that school officials can intentionally promote segregation.

Here, for instance, the petitioners refused to consider expert redistricting proposals (App. 81-84), even though the existing, irregularly shaped districts maximized segregation and could not be defended as minimizing home-to-school distances or safety problems (App. 74-78), even though redistricting which preserved segregation had been approved (App. 73, 80-81), even though various practices ignored district lines altogether with segregative results (App. 53, 65-66, 77-80, 110, 141, 152-53, 156-57), even though a state statute required desegregative redistricting (App. 81),[5] and even though the petitioners themselves agreed

[5] This statute obviously prevents the petitioners from relying on a policy of standing pat as a nonracial justifying factor, even were such a policy consistent with their other behavior and otherwise compelling.

(under pressure from state officials) to redistrict (App. 85-87). Surely this is precisely the kind of manipulation of a neighborhood school policy (see *Keyes,* 413 U.S. at 412), by selective action and inaction promoting segregation, which courts have properly condemned. *Bradley* v. *Milliken,* 484 F.2d 215, 222 (6 Cir. 1973), findings of segregation upheld, 418 U.S. 717, 725, 738 n. 18 (1974); *Oliver* v. *Michigan State Bd. of Educ.,* 508 F.2d 178, 182-84 (6 Cir. 1974); *Hart* v. *Community School Bd. of Educ.,* 2 Cir., No. 74-2076 (1/27/75); *United States* v. *School District No. 151,* 432 F.2d 1147 (7 Cir. 1970), *cert. denied,* 402 U.S. 943 (1971); *Cisneros* v. *Corpus Christi Ind. School District,* 467 F.2d 142, 149 (5 Cir. 1972), *cert. denied,* 413 U.S. 920, 922 (1973); *Hobson* v. *Hansen,* 269 F. Supp. 401, 412-19, 499-501 (D.D.C. 1967), *aff'd,* 408 F.2d 175 (D.C. Cir. 1969); *Spangler* v. *Pasadena City Bd. of Educ.,* 311 F. Supp. 501, 507-12 (C.D. Calif. 1970); *Soria* v. *Oxnard School Dist. Bd. of Trustees,* 386 F. Supp. 539 (C.D. Calif. 1974); see *United States* v. *Bd. of Educ., Tulsa,* 429 F.2d 1253, 1258-59 (10 Cir. 1970).

In sum, the lower Courts stated the correct constitutional standard, carefully applied it to a record brimful with state action intentionally creating and maintaining segregation, and relied on failure to act only in limited and clearly proper ways. Such a case presents no grounds for review by this Court.

II. The Petition's Challenges to the Factual Findings of the Lower Courts Do Not Merit Review.

A. *Review of Factual Findings Concurred In By Two Courts Is Particularly Inappropriate Here.*

Notwithstanding its protestation to the contrary (p. 34), the petition consists mainly of quarrels with the findings of fact made and affirmed below. Thus, the petition dis-

cusses at length (pp. 18-24) Judge Garrity's findings (App. 87-104) that the purpose and effect of feeder pattern changes was segregative, findings which Chief Judge Coffin termed "clearly correct" (App. 16). The petition also asks this Court to review findings concerning a committee (p. 17), the causes of teacher segregation (pp. 27-28), the details of the teacher hiring system (pp. 30-31), and other matters.

This case is a peculiarly inappropriate one for departing from this Court's great reluctance to review findings of fact concurred in by two lower courts. E.g., *Berenyi* v. *District Director, INS*, 385 U.S. 630, 635 (1967). The District Court's findings (App. 41-170) are unusually comprehensive and painstaking, and are based on voluminous evidence thoroughly explored at trial.[6] The Court of Appeals' discussion (App. 1-34) was similarly thorough. That Court pointedly went beyond a simple holding that the District Court findings were not clearly erroneous to commend Judge Garrity's "most deliberate and sensitive attention" (App. 34) and to say that "in the light of the ample factual record and the precedents of the Supreme Court, we do not see how the court could have arrived at any other conclusion" (App. 34). The District Court findings, moreover, coincide with those of two administrative agencies and several state court decisions (see Statement of the Case, *supra*).

B. *The Petition's Factual Arguments Were Properly Rejected Below.*

While space does not permit full exposition here of the gaps and errors in the petition's factual claims, a brief summary (consisting mainly of references to the lower

[6] Petitioners' lead trial counsel (James D. St. Clair) was experienced and vigorous, as are their present counsel.

courts' careful analysis of the same claims) may be helpful.

Overcrowding and portable classrooms. Many white schools were overcrowded and many black ones had space; for explicitly racial reasons, school officers rejected reassignments and busing (which they had used in other situations) and instead placed portable classrooms at white schools so that their students could stay out of black schools (App. 58-64). The petition argues that this was only "maintenance or perpetuation of existing de facto segregation" (p. 13)—but such perpetuation, undertaken for segregative purposes, is plainly unconstitutional.

New construction. Numerous buildings were built so as to be segregated (App. 64-72, 148-50). The petition's suggestion (p. 13) that the petitioners did not approve school sites and could not predict the residential composition of their neighborhoods is simply wrong (App. 13, 65, 84 n. 19, 149, 152, 158-59; Mass. St. 1966, c. 642, sec. 4); the following suggestion (pp. 13-14) that the building of schools so they will open segregated is not "affirmative segregatory conduct" is simply incomprehensible.

Districting and Redistricting. The lower courts did not, as the petition urges (pp. 14-17), rely simply on failure to redistrict to establish a violation. As explained in more detail above (part I(C)), they found an intentionally segregatory pattern of action and refusal to act. "It is beyond dispute that the defendants took every opportunity to maintain segregation where it existed and to foster segregation where it did not." (App. 22). The petition's reference (p. 17) to petitioners' purported integrative plans disregards the District Court's finding that the plans were involuntary and unfulfilled (App. 152, see 66-70). The petition's challenge (p. 17) to half a sentence concerning a committee ignores the context explaining the half-sentence (App. 85-87).

Feeder patterns. The petition's claim (pp. 7, 17-24) that changes in the feeder patterns which channeled students to high schools were, on balance, integrative cannot be refuted in full here; see the District Court's lengthy analysis (App. 87-101). It may suffice to point out that school officials themselves acknowledged the segregative impact of the feeder pattern changes (App. 101-03). English Burke and Girls High Schools were 18.7%, 66.3% and 79% black when the new feeder patterns were first in effect (App. 90-91); they were 81%, over 90% and over 90% black in 1972-73 (App. 101).

Open enrollment. The petitioners repeatedly approved a student transfer policy effectuating segregative transfers as well as integrative ones, and rejected amendments disallowing segregative transfers for the reason that under it white children would be "chained to their seats" in "evenly balanced" schools (App. 104-09). The policy was discriminatorily administered, black students who sought transfers to white schools being discouraged and sometimes greeted by locked doors, removed desks, and segregation in separate rooms (App. 105-07). When forced to relinquish this policy, the petitioners kept on implementing segregative transfers under various loopholes (App. 109-17). The petition's argument (p. 25) that this history "discloses no affirmative segregatory act" is simply inconsistent with the facts.

Faculty segregation and unequal education. Black teachers and administrators were concentrated in black schools (App. 122-28); so were inexperienced teachers, white and black (App. 128-32). The petition's suggestion (pp. 27-28) that this is attributable to collective bargaining agreements ignores the fact that teacher transfer rights long antedate collective bargaining (App. 120), and ignores the law that school administrators and teachers—all of them agents of the state—cannot legalize segregation by

contracting among themselves.[7] And the suggestion (pp. 28-29) that assignment of inexperienced teachers to black schools may have been counterbalanced by other practices benefitting those schools ignores that no evidence of any such practice was submitted by petitioners when they had the chance.

Teacher Hiring. Rank on the Boston hiring lists correlates almost perfectly with scores on the National Teacher Examination, which is thus the heart of the hiring system (App. 133-34). Since blacks do worse on the Examination than whites, they are eliminated disproportionately (App. 135) and are employed in a proportion far less than the percentage of blacks in Boston (App. 132-33). This was a prima facie case of hiring discrimination. E.g., *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 n. 14 (1973); *Chance* v. *Board of Examiners*, 458 F.2d 1167 (2 Cir. 1972); *United States* v. *Texas Educational Agency*, 467 F.2d 848, 868, 873 (5 Cir. 1972). This case was not rebutted by any showing that the Examination or the hiring system as a whole validly predicted job performance (App. 32, 133-34); on the contrary, the Examination's own maker condemns its use in the manner in question here (App. 134-35). The Court of Appeals for the First Circuit therefore joined two such Courts in striking down (App. 31-33) improper use of this Examination. *Walston* v. *County School Bd. of Nansemond County*, 492 F.2d 919 (4 Cir. 1974); *Baker* v. *Columbus Municipal Separate School Dist.*, 462 F.2d 1112

[7] Teacher segregation resulted not only from voluntary teacher transfers but also from explicitly racial assignment by administrators (App. 125). The assertion that this was meant to provide black students with black "role models" was rejected by the District Court as an afterthought (App. 126-27), and would in any event not justify teacher segregation. E.g., *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18-20 (1971); *Smith* v. *Bd. of Educ. of Morrilton School Dist. No. 32*, 365 F.2d 770, 781-82 (2 Cir. 1966) (Blackmun, J.).

(5 Cir. 1972). The petition's argument (pp. 30-31) that other factors besides the Examination were considered by the hiring system cannot survive the finding (App. 134) that as a practical matter hiring depended on the Examination because nearly everyone received about the same score on the other factors.

Promotion. Since only teachers employed in Boston for many years could become administrators, and since hiring discrimination hindered blacks from becoming teachers, blacks were likewise discriminatorily excluded from competition for administrative posts (App. 122, 137-38).[8] The petition's assertion that the requirement of Boston teaching experience was not found to be discriminatory is wrong (App. 31, 33, 138); the assertion (p. 29) that, once the discriminatory hurdle was passed, there was no finding that the rest of the system added more discrimination is correct (App. 31 n. 25), but irrelevant. E.g., *Afro American Patrolmens League* v. *Duck*, 503 F.2d 294, 300-01 (6 Cir. 1974).

Examination Schools and Vocational Programs. In dealing with the three examination schools and six vocational programs the lower courts followed the burden-shifting principle of *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973). *Keyes* provided two bases for findings of segregation as to these parts of the system. First, since these parts were not "separate, identifiable and unrelated units" unaffected by segregatory practices in other schools (App. 25 & n. 20, 154-57), it was proper to conclude that their segregation was part of a city-wide dual system. *Keyes*, 413 U.S. at 203. Second, the petitioners did not rebut the presumption (*Keyes*, 413 U.S. at 208, 210) that segregation in these parts resulted from the same segregatory intent proven

[8] Suspension of this system in 1970 did not improve matters: 30 persons, all white, were given acting administrative appointments (App. 138-39).

elsewhere (App. 26, 140). Indeed, there was affirmative evidence of segregatory acts at these schools and programs, including discriminatory recruitment and preparation, an unvalidated entrance test for the examination school on which whites succeeded two to six times more frequently than blacks, and white faculties (App. 25 n. 20, 26-27, 73 n. 16, 140-45). The petition (pp. 32-34) argues that resort to *Keyes* was inappropriate because there was not sufficient evidence of intentional segregation in a "meaningful portion of a school system". *Keyes*, 413 U.S. at 208. But—even were some of the petition's unfounded claims as to other findings accepted—the massive findings here were far more than needed to bring the *Keyes* rules into operation. *Keyes*, 413 U.S. at 191, 199 n. 10, 208 (segregative acts at 8 out of 119 schools, plus teacher segregation, is sufficient to support presumption that segregated schools throughout the system were intentionally segregated); *Brinkman* v. *Gilligan*, 503 F.2d 684 (6 Cir. 1974); *Berry* v. *School Dist. of Benton Harbor*, 505 F.2d 238 (6 Cir. 1974); see *Kelly* v. *Guinn*, 456 F.2d 100 (9 Cir. 1972), *cert. denied*, 413 U.S. 919; *Cisneros* v. *Corpus Christi Ind. School Dist.*, 467 F.2d 142, 149 (5 Cir. 1972), *cert. denied*, 413 U.S. 920, 922 (1973); *Davis* v. *School Dist. of Pontiac*, 443 F.2d 573 (6 Cir. 1971).

Conclusion

For almost two decades,[9] this Court has declined to resift factual findings of segregation by lower federal courts. Decisions like this one arouse strong feelings—as do the District Court's remedial orders, of which review here will

[9] See *Clemons* v. *Board of Educ.*, 228 F.2d 853 (6 Cir.), *cert. denied*, 350 U.S. 1006 (1956); *Taylor* v. *Board of Educ.*, 294 F.2d 36 (2 Cir.), *cert. denied*, 368 U.S. 940 (1961); cases cited App. 2 n. 1.

undoubtedly also be sought. But for this Court to involve itself for that reason in review of complex facts and voluminous records would impose a great burden with no corresponding benefit. There is no conflict here among the Courts of Appeals, and no question of law meriting this Court's attention. All that is involved is application of well settled principles to the facts of a single case, more than two decades after de jure segregation was held unconstitutional by the Court. It is easy to argue (petition, pp. 34-35) that review on the merits by this Court would help abate any unrest now existing, and just as easy to reply that acceptance of this case for review by the Court would only lengthen the uncertainties which a denial of certiorari would help set at rest. Neither consideration should control. The lower courts here had the advantage of this Court's recent decision in *Keyes* v. *School Dist. No. 1,* 413 U.S. 189 (1973). They conducted a careful analysis of the immense record before them, reaching results which are not "clearly erroneous" (Fed. R. Civ. P. 52) but clearly correct. No issue has been raised warranting further review, and certiorari should be denied.

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SUPREME COURT, U. S.

FILED

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In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1190

KEVIN H. WHITE,
as he is Mayor of the City of Boston, et al.,
PETITIONERS,

v.

TALLULAH MORGAN, et al.,
JOHN J. KERRIGAN, et al.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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KEVIN H. WHITE,
as he is Mayor of the City of Boston, et al.,
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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

The respondents (plaintiffs below) oppose the petition for certiorari of Kevin H. White, as he is Mayor of Boston, the Public Facilities Commissioners of Boston, and the Director of Public Facilities of Boston (the "City petitioners").

Questions Presented

1. Can persons seek certiorari when they were not parties to this case in the District Court until after the appeal period expired, were later joined only for specified purposes not including challenges to the order appealed from, and did not participate in the Court of Appeals?

2. Did both lower courts mistakenly apply the decision and reasoning in *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973) to three schools and to vocational programs in other schools?

3. Has *Keyes* been overruled by *Milliken* v. *Bradley*, 418 U.S. 717 (1974), and can that issue be raised here when it was not raised below?

Statement of the Case

Since the proceedings below and the District Court's decision are adequately summarized in the petition, this statement will be limited to facts concerning the right of the City petitioners to seek certiorari, and concerning the examination schools and vocational programs discussed in the petition (pp. 6-8). Like the petition, this brief will rely on the appendix to the petition for certiorari submitted by the School Committee in No. 74-1188, which will be cited as "App.".

The City petitioners were not among the parties in the District Court at the time of that Court's decision of June 21, 1974 (App. 37-38), and that Court's judgment and order (App. 174-75) did not specifically mention them. The City petitioners were not joined until September 6, 1974, more than 60 days after the court's June 21, 1974 judgment, and their joinder was limited to issues concerning school construction, public safety, security and finances

(petition, p. 2).[1] On appeal, the City petitioners filed no appearance, submitted no brief, and did not participate in oral argument. App. 1; appendix to this brief.

The challenge of the City petitioners to the application of *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973) by the lower courts relates only to the examination schools and vocational programs (petition, pp. 6-8), since the courts found the rest of the Boston school system unconstitutionally segregated without having to rely on the *Keyes* presumption (App. 140, 168).

The examination schools are three secondary schools whose composition in 1972-73 ranged from 2.2% black to 13.7% black (App. 139), the school system as a whole being at least 32% black (App. 56). Their faculties are also overwhelmingly white (App. 139). These schools offer excellent instruction and send graduates to the nation's finest colleges; they have been called elite schools (App. 139). Since they draw pupils from the whole city and two of them are in or near black residential areas, their racial composition is not attributable to any "neighborhood school policy" (App. 140-41). Advanced work classes which constituted "tracks" to the examination schools are 80% white and have been segregated by districting changes (App. 73 & n. 16). Until 1973, admission to these schools was based on examinations on which the success rates for whites was from twice to six times as large as for nonwhites (App. 141). As a result of Massachusetts Commission Against Discrimination proceedings under state law, however, the School Committee agreed that for three years starting with the 1973-74 school year it would base admissions on tests prepared by the Educational Test-

[1] The petition does not suggest that the City petitioners attempted, or were wrongly denied leave, to intervene for broader purposes such as an appeal from the June 21 decision. On the contrary, their joinder was involuntary and they had successfully resisted the School Committee's earlier attempt to join them.

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ing Service of Princeton, New Jersey, and reserve certain seats for students from under-represented districts of the city (App. 141-42). No evidence was presented as to the actual or expected impact of this change or the validity of the new tests as predictors of success in the examination schools.

The cooperative industrial programs are available at six district high schools, and likewise have (with one exception) predominantly white student bodies and faculties (App. 142, 144). Recruiting for these programs was focused on white junior high schools (App. 144). The programs were not available at three mainly black high schools to which the defendants had intentionally channelled black students (App. 100-01, 104, 144). The cooperative industrial programs offer on-the-job experience by which students earn an average of $1,800 per year and often keep their jobs after graduation (App. 143). That advantage is not available at Boston Trade, a mainly black vocational school in need of renovation (App. 139, 143-45), though students at Trade do have certain other opportunities (App. 143).

The lower courts found the examination schools and cooperative industrial programs to be unconstitutionally segregated on two grounds, both following *Keyes* v. *School District No. 1,* 413 U.S. 189 (1973). First, both lower courts found (App. 24-25, 154-57) that no part of the Boston school system constituted a "separate, identifiable and unrelated" unit immune from the effects of discrimination elsewhere in the system. *Keyes,* 413 U.S. at 203. Second, they both found (App. 26, 140-45) that the defendants had failed to rebut the prima facie case of unconstitutional discrimination created by findings of substantial intentional segregation "at all grade levels and in all parts of the city" (App. 140) and the existence of

segregation in fact in these schools and programs. *Keyes,* 413 U.S. at 208-09, 211.

Argument

I. The City Petitioners Were Not Parties Below and Therefore Cannot Seek Certiorari.

Under 28 U.S.C. sec. 1254(1), only "any party" may seek certiorari. No one may petition who was not a party in the Court of Appeals, unless he is seeking review of an improper denial of intervention. *International Union, Local 283* v. *Scofield,* 382 U.S. 205, 208-09 (1965). Similarly, only a party — that is, a party to the judgment appealed from — can appeal from a District Court decision. *Payne* v. *Niles,* 20 How. (61 U.S.) 219 (1858); see *In re Leaf Tobacco Board of Trade,* 222 U.S. 578, 581 (1911); *Ex parte Jordan,* 94 U.S. 248, 252 (1877).

It is clear from the statement of facts above that the City petitioners are not parties in the requisite sense. They did not participate at all in the Court of Appeals (see appendix to this brief). They were not parties in the District Court at the time of the June 21, 1974 judgment (App. 37-38). They were not joined within the 30-day appeal period, or the 30-day extension allowed if the District Court grants leave under Fed. R. App. P. 4(a) (petition, p. 2). When they were joined, it was for limited purposes not including challenges to the Court's decision (petition, pp. 2, 13-14) — a limitation which would in any event have been implicit. See 3B Moore's Federal Practice ¶24.16. They did not seek wider joinder.

Since none of the City petitioners is a "party" within the meaning of 28 U.S.C. sec. 1254(1), the petition should be denied.

II. The Lower Courts Did Not Misapply the *Keyes* Presumption of Segregative Intent to the Examination Schools and Cooperative Industrial Programs.

The petition's contention that certiorari should be granted to review the application of the *Keyes* presumption of segregative intent to the examination schools and cooperative industrial programs is baseless, for several reasons.

1. The Court of Appeals' decision concerning these schools and programs was based not only on the presumption of segregative intent but also on an alternative ground. There are detailed findings in this case that the Boston school system contains *no* separate, identifiable, unrelated parts (App. 154-57). In *Keyes*, the Court made clear that — quite apart from the presumption of segregative intent — proof of state-imposed segregation in a substantial part of a district will suffice to support a finding of a dual system throughout the whole district except in "separate, identifiable and unrelated units." *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 203, 213 (1973). This holding was based on the fact that the impacts and ramifications of segregative acts are most unlikely to be limited to the particular schools in which they occur. 413 U.S. at 201-03. Here, Chief Judge Coffin's opinion not only relied expressly on this ground (App. 24-25) to uphold the District Court's findings of unconstitutional segregation in the examination schools and vocational programs but specifically explained how the facts of this case, as they bear on these schools and programs, "illustrate the logic" of the *Keyes* holding (App. 25 n. 20).

2. Alternatively, reliance on the *Keyes* presumption of segregative intent was wholly proper. The District Court found major instances of intentional segregative acts throughout the school system amounting to "a systematic

program of segregation" (App. 170). These far outstripped the acts in 8 out of 119 schools relied on in *Keyes*, 413 U.S. at 191, 199 n. 10. See, e.g., App. 59-60, 63, 64-65, 79, 96-97, and 150. The *Keyes* presumption does not depend on any showing that the same methods were used to segregate throughout the system, but simply reflects the likelihood that a segregative design at work in one part of the system will also crop up elsewhere. *Keyes*, 413 U.S. at 208. The adoption of a modified admissions system for the examination schools on an experimental basis (App. 141-42), which the petition (p. 7) relies on, scarcely suffices to rebut the presumption of segregative intent, since it was accomplished by litigation under state law against the defendants (App. 141). Nor does it show that segregation resulting from prior practices had been removed root and branch (see *Keyes*, 413 U.S. at 211-12), since the examination schools were still segregated at the time of trial (App. 139).[2] A settlement in a state law proceeding brought by other parties is of course not binding on the plaintiffs-respondents here. *Cf. Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974).

The findings of the District Court and Court of Appeals concerning the presumption of intent in no way depended on the Court of Appeals' suggestion in a footnote that "little short of" a showing of integrative intent would rebut the presumption. App. 26 n. 21. The plain fact is, as the Court of Appeals stated (App. 26) that the defendants offered "no proof" of any kind whatever "that 'segrega-

[2] They are still segregated today. Data presented during recent remedial hearings in the District Court show that the 1974-75 enrollment of the examination schools ranges from 6.5% to 24.8% black. These figures include all grades, including those selected under the old system. Separate data for the two grades selected under the new system are available for two of the schools; those grades are 7.2% black in Boston Latin, and 11.4% black in Girls Latin. Plaintiffs' Requested Remedial Findings, p. 32 (3/3/75; citing evidence).

tive intent was not among the factors that motivated their actions' " (see *Keyes*, 413 U.S. at 210). "Quite the contrary, there is strong evidence to indicate that the segregation . . . was intentional." App. 26. This Court should not grant certiorari for the academic purpose of considering whether the very heavy burden described in *Keyes*, 413 U.S. at 210-211, was aptly summarized in dictum as requiring "little short of" proof of integrative intent.[3]

3. Even apart from the *Keyes* presumption and the inseparability of the school district, plaintiffs established a *prima facie* case that the examination schools were unconstitutionally segregated by showing (App. 73 & n. 16, 139-41) that they were segregated in fact, that they were "fed" by segregated, 80% white advanced work classes, that they admitted students on the basis of an examination in which the percentage of passing whites was two to six times the percentage of passing blacks, that their teaching staff was virtually all white, and that they offered educational opportunities unavailable elsewhere in the system. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971); see *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431-33 (1971); *Jones* v. *Georgia*, 389 U.S. 24 (1967). Plaintiffs raised this claim in both lower courts, and the defendants failed to rebut it by introducing evidence that either the old or the new admissions procedure had been validated, but neither lower court found it necessary to reach this ground of decision.

4. The application of *Keyes* to three schools and six vocational programs in a 200-school system does not, in

[3] The dictum was in any event a fair condensation of *Keyes*. Since the *Keyes* presumption can be rebutted only by showing that "segregative intent was not among the factors that motivated" school actions, and reliance on a "racially neutral explanation" does not suffice (413 U.S. at 210), a showing of integrative intent would usually be the only persuasive rebuttal.

the circumstances of this case, raise issues of sufficient importance to warrant certiorari. Certainly it does not warrant certiorari at this intermediate stage, when the specific final relief granted as to the examination schools and vocational programs is not before the Court. The lower courts relied on the *Keyes* presumption of segregative intent only in relation to these schools and programs, unconstitutional segregation elsewhere in the system having been directly proven (App. 168).

III. Milliken v. Bradley Did Not Overrule Keyes v. School Dist. No. 1.

The petition's claim (pp. 9-11) that *Milliken* v. *Bradley*, 418 U.S. 717 (1974) must be taken to have modified *Keyes* v. *School District No. 1*, 413 U.S. 198 (1973), as *Keyes* applies to this case, was not raised below by any party, or considered by the Court of Appeals. Such a claim is not ordinarily heard in the first instance here. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970). There was no lack of opportunity to raise it below. Although *Milliken* was decided after the District Court's decision in this case, it antedated the filing of briefs, argument and decision in the Court of Appeals (see appendix to this brief).

Far from overruling *Keyes'* treatment of the standards for proving *de jure* segregation *within* "a single autonomous school district" *Milliken* expressly confirmed and relied upon the *Keyes* reasoning. *Milliken*, 418 U.S. at 738 n. 18, 741 n. 19. Just what modes of inference are appropriate for interdistrict cases was not settled by *Milliken*. That case was not argued on the theory that *Keyes*-like presumptions should be used to show metropolitan-wide intentional segregation; rather, the Court rejected the claim that neighboring school districts should be drawn

in for the sake of remedial efficacy when there were no findings that unconstitutional state action had caused interdistrict segregation. 418 U.S. at 752. In any event, there is no inconsistency in recognizing presumptions arising from the existence of intentional segregation within a school district — where one set of officials is in charge and student assignment policies are directly interconnected — even though no identical presumption is recognized between districts. Nor is it inconsistent for a Court, in the administration of its equitable remedial powers, to recognize that the difficulties of judicially supervised governmental restructuring — totally absent from root-and-branch desegregation within a functioning district — call for a somewhat different approach to the question of desegregation across unit boundaries. *Milliken,* 418 U.S. at 743; *id.* at 754-55 (concurring opinion of Stewart, J.).

Even were there some latent conflicts between *Keyes* and *Milliken,* this case would be an inappropriate vehicle for addressing them because such conflicts have not surfaced here. The lower courts in this case have required the participation of all parts of the city in the desegregation remedy not just because they are all "part of the same jurisdiction" (Petition p. 10) but because of "detailed findings of intentional segregation of students and staff at all grade levels and in all parts of the city." (App. 140). The Petition's assertion (p. 10) that Boston's school system is "bizarre geographically" is belied by the proven operation of the segregated system, in which tens of thousands of students used transportation to attend schools throughout the city. (App. 55-56, 103, 116 n. 31, 152-57). The examination schools and vocational programs were city-wide (App. 54, 140-41, 156), and the *Keyes* presumption of segregative intent was relied on only as to these schools and programs (App. 168).

Conclusion

For these reasons, certiorari should be denied.

Respectfully submitted,

J. Harold Flannery,
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Laurence S. Fordham, John Leubsdorf,
(Foley, Hoag & Eliot);
Robert Pressman, Eric E. Van Loon,
(Center for Law and Education);
Rudolph F. Pierce,
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APPENDIX A

GENERAL DOCKET

United States Court of Appeals
For the First Circuit

Case No. 74-1251
TALLULAH MORGAN ET AL. *v.* JOHN J. KERRIGAN ET AL.

1974

Aug. 5 Record on appeal in one volume filed and case docketed.

8 Appearance of John O. Mirick for Appellant filed. Appearance of McMahon for intervenor Boston Teachers Union filed. Appearance of John Leubsdorf, J. Harold Flannery, Laurence S. Fordham, Robert Pressman, Eric E. Van Loon Thomas Simmons and Nathaniel R. Jones for plaintiffs, appellees filed.

9 Appearance of Sandra L. Lynch and Walter H. Mayo, III for Board of Education filed.

15 Appellants statement of issues and designation of record appendix filed. Motion to refer to certain exhibits without reproduction filed.

19 Motion filed. Order (Coffin, Ch. J.) granting leave to parties to refer to Plaintiff's exhibits 19, 20, 21, 23, and 24 without reproduction thereof in the appendix. Notices mailed.

21 Supplemental record on appeal consisting of two transcripts and one motion filed.

23 Appearance of Thomas Simmons for Appellee filed. Appearance of Roger Abrams for [sic]

26 Plaintiffs, Appellees' counterdesignations filed.

1974

26 Motion filed. Order (Coffin, Ch. J.) allowing joint motion concerning appendix. Notices mailed.

Sept. 4 Supplement to record consisting of twenty-eight volumes of transcript filed.

6 Motion filed. Order (Coffin, Ch. J.) enlarging time for appellant to file brief and appendix to and including Sept. 23, 1974. Notices mailed.

20 Motion filed. Order (Coffin, Ch. J.) granting leave to appellant to filed brief not in excess of 62 printed pages. Notices mailed. Appendix to briefs filed.

23 Appearance of Stephen H. Oleskey for appellants filed. Brief for appellant filed.

Oct. 10 Leave granting appellees to file a brief not in excess of (90) ninety pages. Notices mailed.

15 Brief for appellee filed. Supplemental appendix for appellee filed by leave of Court.

25 Assigned for hearing on November list.

Nov. 4 Heard before Coffin, Ch. J. McEntee & Campbell, JJ.

Dec. 19 Judgment: The order of the District Court is affirmed. Opinion by Coffin, Ch. J. Counsel notified.

31 Verified bill of costs filed.

1975

Jan. 16 Taxation of costs filed. Mandate issued, copy filed and original papers transferred to case No. 75-1001. Notices mailed.

Mar. 21 Notice of filing petition for certiorari (74-1188) filed 3/19/75.